

## POLITICS WITHOUT ROMANCE: IMPLICATIONS OF PUBLIC CHOICE THEORY FOR STATUTORY INTERPRETATION

*William N. Eskridge, Jr.\**

**A**N IMPORTANT QUESTION of positive and normative legislation theory is what role courts should assume when they interpret statutes (as opposed to the Constitution and the common law). One can imagine the range of roles as a continuum. At one pole is an "archeological approach," in which a court's role is to unearth and enforce the original intent or expectations of the legislature that created the statute. Under this approach, statutory interpretation is an effort to discern the original answer put into the statute. At the other pole is a "free inquiry approach," in which the court's role is to reach the best result, formally unconstrained (though perhaps influenced or persuaded) by the statute's text and legislative history. These two poles represent different aspirations for statutory interpretation. The archeological approach appeals to formal legitimacy (the nonelected judge is not exercising any discretion but is merely carrying out the will of the majoritarian legislature), while the free inquiry approach appeals to functional legitimacy (justice or good results).<sup>1</sup>

Traditional theories of statutory interpretation take something close to an archeological approach, though without admitting that good results are thereby sacrificed.<sup>2</sup> Traditional theorists accomplish this feat by assuming (with varying degrees of explicitness) a

---

\* Visiting Associate Professor of Law, Georgetown University Law Center.

I am grateful for generous and constructive comments on a previous draft from James Buchanan, Ronald Cass, Daniel Farber, Philip Frickey, Vicki Jackson, Jonathan Macey, Jerry Mashaw, Richard Posner, Edward Rubin, and Warren Schwartz. Any errors and omissions are my own fault. (I also thank Professor Buchanan for permitting me to use as part of the title to this Article a phrase he has used to sum up the public choice vision of politics.)

<sup>1</sup> The archeological metaphor used in this paragraph was suggested to me by Professor T. Alexander Aleinikoff. The free inquiry metaphor is taken from F. Geny, *Méthode d'Interprétation et Sources en Droit Privé Positif* (1899).

<sup>2</sup> See R. Dickerson, *The Interpretation and Application of Statutes* 87-102 (1975) (focusing on legislative purpose); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1201 (tent. ed. 1958) (statutory interpretation should be a

romanticized vision of politics, which can be traced back to the political thought of James Madison. "Optimistic pluralists" posit that the legislature, filled with reasonable people acting reasonably, will tend to pass public-seeking laws, so long as the legislators follow the deliberative procedures required by the Constitution. This viewpoint framed the context within which post-World War II legal scholars thought about statutory interpretation. Optimistic pluralism offers a most appealing vision, because it suggests that there is typically no tension between giving effect to the expectations of Congress and accomplishing good policy.<sup>3</sup>

This vision of legislation has fallen under sustained and persuasive criticism in the last three decades, however. Public choice theory, which analyzes the political process using principles of economics, posits a very different vision of legislation. Professor James Buchanan calls it "politics without romance" and suggests that "[p]ublic choice theory has become the avenue through which a romantic and illusory set of notions about the workings of governments" has been replaced with more realistic notions.<sup>4</sup> As public choice theory has deromanticized the political process, legal scholars have reexamined the traditional statutory interpretation theory that rested on the now-questioned political assumptions. Important contributions have been made by Judge Richard Posner,<sup>5</sup> Judge Frank Easterbrook,<sup>6</sup> Professors Daniel Farber and

---

"calculus to serve the ultimate purposes" of the law); 2A Sutherland Statutory Construction § 45.05, at 20-21 (4th ed. 1984) (intent of legislature).

<sup>3</sup> This idea is explored in more detail in Part I, *infra* pp. 280-83, and in Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 694-99 (1987).

<sup>4</sup> Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *The Theory of Public Choice—II*, at 11 (J. Buchanan & R. Tollison eds. 1984).

<sup>5</sup> See R. Posner, *The Federal Courts* 286-93 (1985); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263 (1982) [hereinafter Posner, *Economics, Politics*]; Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983) [hereinafter Posner, *Statutory Interpretation*]; Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179 (1986-87) [hereinafter Posner, *Legal Formalism*].

<sup>6</sup> See Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984) [hereinafter Easterbrook, *Foreword*].

Philip Frickey,<sup>7</sup> and Professor Jonathan Macey,<sup>8</sup> each of whom has suggested a general theory of statutory interpretation tied at least in part to the insights of public choice theory. Other scholars, such as Justice Antonin Scalia,<sup>9</sup> have used public choice arguments to illuminate specific issues, such as the proper use of legislative history in statutory interpretation.

How might public choice theory affect the doctrine and practice of statutory interpretation? Probably the main impact of public choice theory is negative: its descriptive vision of the legislative process drives a wedge between the aspirations of traditional statutory interpretation (rational policy) and its legitimizing methodology (original legislative intent or purpose). Part I of this Article explores this negative impact. Public choice theory indicates that the legislature will produce too few laws that serve truly public ends, and too many laws that serve private ends. This is a Madisonian nightmare. If public choice theory is correct, a court that sought to enforce the original "deal" embodied in a statute could only contribute to the nightmare. Although a positive (descriptive) theory, public choice thus has at least one normative implication: its vision of politics undermines our faith in the archeological approach to statutory interpretation, as it traditionally has been articulated and defended.

Does public choice theory tell us anything more affirmative about statutory interpretation? This issue is explored in Parts II and III of this Article. In my view, public choice theory does not support any general theory of statutory interpretation, but does suggest some useful lines of inquiry. Although public choice theory has explored the operation and dysfunctions of legislatures and agencies, the public choice literature on the operation of courts is meager and focuses mainly on judicial common law making. To contribute meaningfully to legal theories of statutory interpreta-

---

<sup>7</sup> See Farber & Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988).

<sup>8</sup> See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986) [hereinafter Macey, *Public-Regarding Legislation*]; Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 Va. L. Rev. 471 (1988) [hereinafter Macey, *Constitutional Ordering*].

<sup>9</sup> See, e.g., *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (committee reports offer only a very uncertain reflection of the true intent of legislators); see also Farber & Frickey, *supra* note 7 (analyzing public choice themes in the opinions of Justice Scalia and other recently appointed judges).

tion, public choice would have to provide us with insights about the *comparative competence* of courts to make law, or to supplement or correct the law made by Congress and the agencies.

Although the existing public choice literature on legal theory does not offer a full theory of comparative competence, the germ of such a theory may nevertheless be discernible. Part II posits three hypotheses and tests them against public choice arguments. The hypotheses are: the pure archeological approach to statutory interpretation, an intermediate dynamic approach, and the free inquiry approach. Three lines of public choice inquiry are used to test those hypotheses: Which hypothesis best reflects the comparative institutional competence of Congress, agencies, and courts to make legal rules? What would be the effects of each approach on political actors, including interest groups and Congress? Under which approach does our political system work "best"? At this point, public choice theory affords us no definitive answers to these three inquiries. On the whole, though, the theory does offer tentative support for the intermediate hypothesis—for dynamic interpretation—and suggests that the archeological hypothesis be rejected.<sup>10</sup> This conclusion runs against the assumed wisdom about the implications of public choice theory for statutory interpretation.

Public choice theory, however, suffers from a more serious limitation on its usefulness in legal discussions of statutory interpretation. That limitation derives from the controversial nature of the theory itself. Critics argue that public choice theory's conclusions are indeterminate and incomplete and—worse even—that the theory's conclusions undermine our sense of political community. In Part III, I assume the critics are right. Does public choice theory nevertheless offer useful insights for statutory interpreters uncomfortable with or skeptical of the theory? I argue that it does. To begin with, by envisioning legislative politics at its worst, public choice alerts judges to occasions when the legislative process has most likely been misdirected; the theory, moreover, suggests the ways in which the legislative process has likely miscarried. Miscarriage is least likely where a statute establishes "symmetrical" obligations and benefits (i.e., the groups benefiting from a law are of

---

<sup>10</sup> For my earlier development of "dynamic statutory interpretation" from literary and historiographical theory, see Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

comparable size and political clout to those upon whom the law imposes costs), for in those instances the political process has probably worked as well as it can. Statutes with evenly balanced costs and benefits, however, are unfortunately too seldom updated by the legislature. Hence, courts ought to consider adopting a broad interpretive strategy towards these "symmetrical" statutes, updating them over time to meet changed circumstances. On the other hand, where a statute establishes "asymmetrical" obligations and benefits (i.e., the beneficiaries of the law have either more or less political clout than the cost payers), there is a danger of legislative or administrative dysfunction, which a court might deal with through a public-seeking or narrow interpretation of the statute.

More importantly, public choice theory calls attention to the dynamic nature of statutes and thereby emphasizes the consequences of different interpretations or interpretational strategies. The political incentives and structures identified by public choice theory suggest both useful and deleterious ways for statutes to evolve; judicial interpreters can encourage the useful ways and discourage the deleterious ways, at least in some cases. For example, regulatory agencies enforcing asymmetrical statutes (statutes that, for instance, protect public benefits at the expense of a more concentrated regulated group) tend to be influenced by the regulated interests over time. The degree of interest group influence varies, but it tends to thwart the original, stated goals of the statute. Knowing this, courts have developed strategies for monitoring agency enforcement and correcting agency missteps.

Perhaps the most important lesson of public choice theory for statutory interpretation is that it deepens our understanding of the court-legislature dialogue. A court is often tempted to finesse a hard interpretational choice by "leaving it to the legislature." This is frequently the worst place to leave the choice. Before doing that, the court ought to consider the legislature's incentives to act (and to act constructively) or not to act. For example, the court might consider whether the "losers" of the interpretational lawsuit will have effective access to the legislature to seek clarification. Public choice theory's rough rules of thumb for predicting interest group formation and legislative deliberation in response to controversial judicial interpretations should encourage judges to be more selective about leaving it only to the legislature or agencies to carry on the policy dialogue instinct in statutes.

## I. PUBLIC CHOICE THEORY AS A MADISONIAN NIGHTMARE

James Madison's essays on "factions" and the desirability of representative government in the *The Federalist*<sup>11</sup> have been the starting point for much American political theory. Self-interested factions are inevitable, and Madison believed that government must be structured to minimize their influence. Although Madison believed in self-government by "the great body of the people,"<sup>12</sup> he opposed direct democracy because he feared that factions would dominate and displace "the permanent and aggregate interests of the community."<sup>13</sup> Decision by direct vote of the people might reflect nothing more than temporary majorities, formed out of inflamed passions or transient coalitions. Madison argued that a better way to effectuate "[t]he regulation of these various and interfering interests" was representative government.<sup>14</sup> "[T]he public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."<sup>15</sup>

Madison believed that structural features of the legislature would prevent the representatives themselves from being dominated by factions. As a large republic, the United States would have many representatives, each having a broad constituency. This would protect many representatives against being captured by any one faction. More important protections, moreover, would come from bicameralism and the executive veto. Bicameralism would not only provide a double review of proposed legislation, but also would assure two distinct perspectives.<sup>16</sup> The House of Representatives, with members from smaller districts and subject to electoral

---

<sup>11</sup> For relevant commentary on *The Federalist*, see, e.g., D. Epstein, *The Political Theory of The Federalist* (1984); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984); Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

<sup>12</sup> *The Federalist* No. 39, at 240 (J. Madison) (C. Rossiter ed. 1961).

<sup>13</sup> *The Federalist* No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Id.* at 82.

<sup>16</sup> *The Federalist* No. 51 (J. Madison). "In republican government," noted Madison, "the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." *Id.* at 322 (C. Rossiter ed. 1961).

scrutiny every two years, would have an "immediate dependence on, and an intimate sympathy with, the people."<sup>17</sup> The Senate, whose members were originally elected by state legislatures for six-year terms, would have greater leisure to acquaint themselves with the issues and discuss them deliberatively.<sup>18</sup> Finally, the President's veto power would give the official with the largest constituency the power to block factional legislation even if it got through both chambers of Congress.<sup>19</sup>

The genius of Madison's thought lay in its reconciliation of our potentially antipodal desires for both legitimate majoritarian government and rational public-seeking government. The former was assured by vesting policymaking authority in the popularly elected legislature. The latter was abetted by a constitutional framework assuring deliberative lawmaking and checking factional domination. Madison's ideas have had a continuing influence in American political thought. After World War II, the prevailing political theory was an optimistic pluralism tied to Madison's ideas.<sup>20</sup> Although the pluralists of the 1950's accepted interest group domination of government, they were optimistic that the role of interest groups would not result in mere shifting, temporary majorities. Groups, it was hoped, would emerge on all sides of each issue and the protective procedures of lawmaking (bicameralism, the veto, committee review) would ensure rational accommodation of interest group needs.

The most influential work on statutory interpretation in the 1950's was the legal process materials of Professors Henry Hart and Albert Sacks.<sup>21</sup> Their approach was a brilliant application of Madison's reconciliation—updated—to modern statutory interpretation. While occasionally acknowledging that most statutes are passed in response to interest group pressure,<sup>22</sup> Hart and Sacks

---

<sup>17</sup> The Federalist No. 52, at 327 (J. Madison) (C. Rossiter ed. 1961).

<sup>18</sup> The Federalist No. 62 (J. Madison); see The Federalist No. 71 (A. Hamilton).

<sup>19</sup> The Federalist No. 51 (J. Madison).

<sup>20</sup> Professor Theodore Lowi calls this "interest-group liberalism." T. Lowi, *The End of Liberalism* 51 (2d ed. 1979). Examples of optimistic pluralists are W. Binkley & M. Moos, *A Grammar of American Politics* (1949); R. Dahl, *A Preface to Democratic Theory* (1956); D. Truman, *The Governmental Process* (1951). All of these political philosophers start with Madison, and Dahl's book is an extended analysis of Madisonian theory.

<sup>21</sup> H. Hart & A. Sacks, *supra* note 2. For a more elaborate analysis of Hart and Sacks' political theory, see Eskridge & Frickey, *supra* note 3, at 694-99.

<sup>22</sup> See, e.g., H. Hart & A. Sacks, *supra* note 2, at 829.

posited that the legislative process would work well so long as proper procedures were followed. In their ideal, legislative procedure would be an "informed process" (decisions would be made only after a thorough factual context had been established) and a "deliberative process" (legislators and experts would publicly discuss the consequences of various policy alternatives).<sup>23</sup> Hart and Sacks' belief that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment"<sup>24</sup> was similar to Madison's idea that procedural structures can ensure deliberation and check factions.

The result of this deliberative process, argued Hart and Sacks, would be rational, purposive statutory law.<sup>25</sup> This would render the Madisonian reconciliation applicable to statutory interpretation: once it was established that the legislature had made rational policy, the role of courts interpreting statutes would be to carry forth that rational process to hard questions not specifically addressed by the statutory language. Hart and Sacks could have then moved in either of two directions. Like most prior scholarship on statutory interpretation, they could have emphasized legislative intent. The public statements of legislators (in committee reports and on the floor of the legislature) are clues to the rational consensus produced in the deliberative process.<sup>26</sup>

The preferred methodological approach for Hart and Sacks, however, was one that promised more creativity for the interpreter. Because "every statute . . . has some kind of purpose or objective," Hart and Sacks argued that ambiguities could be resolved, first, by identifying that (presumably) rational purpose and, then, by deducing the result most consonant with that purpose.<sup>27</sup> As a surrogate for legislative intent, legislative purpose seemed majoritarian, but as a more flexible concept it enabled judges to expand the rational policies of the statute into new situations, unforeseen at the time of the statute's passage.

---

<sup>23</sup> Id. at 715-16.

<sup>24</sup> Id. at 715.

<sup>25</sup> Id. at 1156-57. "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible," the materials archly observe. Id. at 1156.

<sup>26</sup> Indeed, much of the Hart and Sacks materials is a sophisticated introduction to the use of legislative history to uncover the presumed rational legislative intent.

<sup>27</sup> H. Hart & A. Sacks, *supra* note 2, at 166-67. Hart and Sacks posited that a statutory interpreter must assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." Id. at 1415.



So long as political theory subscribed to something like the optimistic pluralism of the 1950's (or avoided the issue), reconciliation of majoritarianism and rational policy was safe. Since the 1950's, however, optimistic pluralism has been substantially discredited, in large part through the descriptive contribution of public choice theory. Public choice theory indicts this highly romantic vision of the political process on three counts.<sup>28</sup> First, decisionmaking by majority rule yields arbitrary and discriminatory results. Second, interest groups skew public decisionmaking toward private rent-seeking and away from public interest statutes. Third, the proceduralism of Madison, and Hart and Sacks, provides scant protection against the ills of rent-seeking government. The gritty realism of public choice exposes both the incoherence of the Madisonian reconciliation and the political mythology underlying Hart and Sacks' theory of statutory interpretation.

#### *A. The Arbitrariness of Majority Rule*

One branch of public choice theory examines legislation and voting as a game in which rational behavior by the game players yields unhappy results for the group as a whole. Consider a three-person legislature that does nothing but allocate tax money to build roads, with one project being voted on each year. Legislator *A* wants a new road for her district (Decision 1). Legislator *B* wants to repair a road in his district and invest the surplus funds (Decision 2) or, failing that, to build *A*'s road, which will pass through *B*'s district. Legislator *C*, whose district has good roads, wants to invest all the money (Decision 3). What will the legislature do with the money, under majority voting rules?

The answer is indeterminate, for the three decisions form a "majority cycle." A pairwise vote on Decision 1 versus Decision 2 would yield Decision 2 (*B* and *C* in the majority). A vote on Decision 2 versus Decision 3 would yield Decision 3 (*A* and *C* in the majority). Yet a vote on Decision 3 (the winner in 2 versus 3) against Decision 1 (the loser in 1 versus 2) would yield Decision 1 (*A* and *B* in

---

<sup>28</sup> There are two different types of public choice analysis. Social choice theory focuses on how decisions are made under various social rules. Interest group theory focuses on the incidence and influence of interest groups. This Article draws most of its analysis from the latter.

the majority)! In other words, depending on the order of pairwise voting, any of the decisions can be adopted. Professors Duncan Black and Kenneth Arrow argued that majority cycling is the typical phenomenon when complex choices must be made.<sup>29</sup> Majority cycling suggests, at least, that results achieved under "democratic" voting rules are arbitrary. The mere fact that Decision 1 is adopted may mean nothing more than that Legislator A controls the agenda (e.g., holds the chair during the proceedings).<sup>30</sup>

It gets worse. Expand the hypothetical to consider the potential social loss from majority voting, as Professors James Buchanan and Gordon Tullock did in their classic work *The Calculus of Consent*.<sup>31</sup> Assume that Legislator A controls the agenda, so that Decision 1 is the last to pair up, winning against Decision 3. In addition, assume that the the social benefit of Decision 1 is 100 (55% of which accrues to District A and 45% to District B) and that the social benefit of Decision 3 is 120 (shared equally by the three Districts). Obviously, from the collective point of view, the best decision is Decision 3 (no projects this year), yet a coalition of A and B will vote for Decision 1. This is not only unfair to C (which gets no benefit even though it pays taxes), but is collectively wasteful as well (to the tune of 20).<sup>32</sup>

A significant game theory lesson from the Buchanan and Tullock study is the importance of symmetrical costs and benefits. In simple voting games, there is a strong tendency toward social waste

---

<sup>29</sup> See K. Arrow, *Social Choice and Individual Values* (2d ed. 1963); D. Black, *The Theories of Committees and Elections* (1958); W. Riker, *Liberalism against Populism* (1982); A. Sen, *Collective Choice and Social Welfare* (1970); McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. Econ. Theory 472 (1976); cf. Niemi, *Majority Decision-Making with Partial Unidimensionality*, 63 Am. Pol. Sci. Rev. 488, 494-95 (1969) (social decisions are possible through simple majority voting if most—not necessarily all—voters array their preferences along uniform criteria).

<sup>30</sup> The person or group controlling the agenda might also be subject to the arbitrary process of cycling. See K. Shepsle, *The Giant Jigsaw Puzzle* (1978).

<sup>31</sup> J. Buchanan & G. Tullock, *The Calculus of Consent* 131-69 (1962); see Tullock, *Problems of Majority Voting*, 67 J. Pol. Econ. 571 (1959).

<sup>32</sup> As Buchanan and Tullock note, the dynamics of this can be changed by allowing side payments (logrolling). To avoid being closed out entirely, C can offer B up to 40 to persuade B to change its vote to Decision 3. This is an important caveat to the horrible results described in the text, but Buchanan and Tullock also demonstrate that even with side payments, winning coalitions will often form for decisions in which the total collective gains will be less than total expenditures (or the potential gains of another decision). See J. Buchanan & G. Tullock, *supra* note 31, at 155-57.

when benefits and costs are asymmetrical—as when a political decision concentrates costs on a minority (*C* in my hypothetical) in order to give more widely distributed benefits (to *A* and *B*).<sup>33</sup> Such waste is less likely when costs and benefits are symmetrical—as when the political decision distributes both benefits and costs broadly across the population or concentrates benefits and costs very narrowly.<sup>34</sup>

### *B. The Dysfunctional Interest Group Market for Legislation*

Subsequent public choice scholarship has broadened the lessons of game theory by analyzing the dynamics of interest group government. Public choice theorists typically treat legislation as an economic transaction in which interest groups form the demand side, and legislators form the supply side.<sup>35</sup> On the whole, this branch of public choice theory demonstrates that the market for legislation is a badly functioning one. That is, the market systematically yields too few laws that provide “public goods” (i.e., laws that contribute to the overall efficiency of society by providing a collective benefit that would probably not arise from individuals acting separately). And it systematically yields too many laws that are “rent-seeking” (i.e., laws that distribute resources to a designated group without any contribution to society’s overall efficiency).

The demand for legislation is determined by the incidence and activity of interest groups. The optimistic pluralists believed that interest groups would form in response to true disturbances in the social environment and, hence, normally would press legitimate grievances and would bring a variety of socioeconomic perspectives into the subsequent political debates.<sup>36</sup> Public choice theory sug-

---

<sup>33</sup> See *id.* at 164-67.

<sup>34</sup> See *id.* at 167-68.

<sup>35</sup> Some scholars, however, analyze the transaction as one in which one interest group obtains benefits at the expense of other groups or society as a whole; legislators are treated as brokers or agents who effectuate the transfer. E.g., R. McCormick & R. Tollison, *Politicians, Legislation and the Economy* (1981). The more common analysis, and the one employed here, treats legislation as a sale by legislators to interest groups.

Important sources for the analysis in this Part are M. Hayes, *Lobbyists and Legislators* (1981); M. Olson, *The Logic of Collective Action* (1965); J.Q. Wilson, *Political Organizations* (1973); Salisbury, *An Exchange Theory of Interest Groups*, 13 *Midwest J. Pol. Sci.* 1 (1969).

<sup>36</sup> See, e.g., D. Truman, *supra* note 20, at 26-43.

gests, however, that interest groups form more selectively and, therefore, that the demand for legislation is highly biased.

Professor Mancur Olson's "logic of collective action"<sup>37</sup> helps to explain why interest groups form so selectively. He argues that interest group formation involves a classic "free rider problem." Legislation is a "nonexcludable" public good that will benefit all members of the affected group even if they do not contribute to its enactment. Because group members will have incentives to free ride (i.e., collect the benefit without contributing to the effort), not enough members will contribute, and the public good will not be provided. The free rider problem is most acute for large groups in which individual stakes will usually be very small, for there the tendency to rely on others to carry the ball will be quite substantial. The problem is less acute for small groups, especially where the potential gain for each beneficiary is larger, because in those groups there is more opportunity for the members to work out a collective deal, and free riders can more easily be monitored and perhaps excluded from the law's benefits. This is most likely if the small group enjoys consensus about its goals, for consensus substantially reduces the transaction costs of group formation.

The free rider problem means that social and economic difficulties will not always stimulate group formation, especially for large, diffuse groups like consumers and taxpayers, and that (in contrast) small, elite groups might more easily organize, though for no other reason than to raid the public fisc. These conclusions are, however, expressed in probabilities only. Olson recognized that large groups could form if there were selective benefits for their members (e.g., the information sharing and cooperative economic action that farm organizations offer their members), or if members were coerced to join (e.g., professional associations). Additionally, subsequent public choice scholarship has demonstrated that large groups will sometimes be fueled by shared ideological interests, well-recognized threats, and historical factors.<sup>38</sup> Nonetheless, Olson's main point, that different groups will enjoy highly variant abilities to

---

<sup>37</sup> See M. Olson, *supra* note 35.

<sup>38</sup> See T. Moe, *The Organization of Interests* (1980); Hansen, *The Political Economy of Group Membership*, 79 *Am. Pol. Sci. Rev.* 79 (1985); Smith, *A Theoretical Analysis of the "Green Lobby"*, 79 *Am. Pol. Sci. Rev.* 132 (1985).

overcome the free rider problem, has received some empirical support<sup>39</sup> and is widely accepted in the public choice literature.

Formal organization of an interest group is important if that group is to wield substantial influence in the political arena.<sup>40</sup> Groups that are formally organized and willing to spend money to obtain or block legislation will tend to monopolize the attention of legislators, at the expense of groups that are not organized. The latter will not only fail to press their point of view, but will also be subject to manipulation: they may not recognize the harms they will suffer from proposed legislation and, even if informed, may be falsely reassured by symbolic action. Notably, however, unorganized interests may still have an impact if their preferences are strong and commonly held, for public opinion itself works as an important constraint on legislative action.<sup>41</sup>

In a very rough way, one may plot probable demand for legislation by looking at the incidence of costs and benefits.<sup>42</sup> Costs associated with legislation may be broadly distributed, as through a general tax increase or a rule applicable to the whole population, or narrowly concentrated, such as through a user fee or a license charge. Similarly, legislation may offer benefits that are broadly distributed, such as roads or other public goods, or concentrated, such as a subsidy or monopoly grant to a specific group. Under Olson's theory, one would expect concentrated benefits and, especially, concentrated costs to stimulate more interest group formation, because the smaller and more focused groups will normally be better able to surmount the free rider problem. Conversely, distributed costs or benefits will presumably not tend to produce as much organizational activity.

The supply of legislation depends on the responses of legislators to these demand patterns. Optimistic pluralists paid little attention to the incentive structures of elected representatives and generally just assumed that the representatives' policy choices represented some kind of amalgam of constituency preferences and reasonable judgment. Public choice theorists, however, suggest that

---

<sup>39</sup> See, e.g., Kim & Walker, *The Free Rider Problem: Experimental Evidence*, 43 *Pub. Choice* 3 (1984).

<sup>40</sup> See M. Edelman, *The Symbolic Uses of Politics* (1964); M. Hayes, *supra* note 35, at 68-71.

<sup>41</sup> See Denzau & Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 *Am. Pol. Sci. Rev.* 89 (1986).

<sup>42</sup> J.Q. Wilson, *supra* note 35; see M. Hayes, *supra* note 35.

representatives' supply of legislation is driven by a desire to avoid controversy and, hence, is skewed toward nondecision and rent-seeking.

Public choice theory argues that legislative behavior is driven by one central goal—the legislator's desire to be reelected.<sup>43</sup> A legislator seeking reelection faces the "dilemma of the ungrateful electorate": the good things a legislator does for an interest group are forgotten more easily than the bad things are forgiven. To avoid this dilemma, a legislator will typically try to avoid or finesse "conflictual" demand patterns. On the one hand, the legislator will seek out "consensual" demand patterns—issues on which her constituency is not divided. Thus, a legislator will spend a great deal of time doing "casework" (no one is hurt by this and constituents for whom favors are done are obviously happy) and "pork barreling" (from which the district receives tangible goodies, paid for out of general revenues). At the same time, the legislator will try to avoid taking hard positions on those issues that divide her constituents. But on those issues around which important and organized groups have formed, the legislator will try to help the groups, though in ways that will—she hopes—escape the notice of the legislator's other constituents. On the other hand, when a legislator cannot avoid conflictual demand patterns, she will try to satisfy all the relevant interest groups through a compromise statute acceptable to all concerned. If this cannot be accomplished, the legislator's next-best strategy will be to support an ambiguous law, with details to be filled in later by courts or agencies. In that way, the legislator will be able to assure each group that it won, and then will be able to blame a court or agency if subsequent developments belie that assurance.

One can predict what sort of legislative output is likely, again, based on the incidence of costs and benefits.<sup>44</sup> Legislation—whether symbolic or substantive—is unlikely where there is little organized demand (distributed benefits), or where demand is

---

<sup>43</sup> See M. Fiorina, *Congress: Keystone of the Washington Establishment* (1977); D. Mayhew, *Congress: The Electoral Connection* (1974). Contrast this view with R. Fenno, *Congressmen in Committees* (1973), which states that legislators have three goals: reelection, prestige within the legislature, and a desire to contribute to policy debates constructively.

<sup>44</sup> See M. Hayes, *supra* note 35, at 93-126; Hayes, *The Semi-Sovereign Pressure Groups: A Critique of Current Theory and an Alternative Typology*, 40 *J. Pol.* 134 (1978).

met by strong opposition (because of concentrated costs).<sup>45</sup> And if such legislation is enacted, because demand is so weak, the legislation will generally not subsequently be updated to reflect changed circumstances. In situations of consensual demand patterns (primarily concentrated benefit, distributed cost measures), legislators will tend to distribute benefits to organized groups, or to grant those groups self-regulatory authority. In conflictual demand situations (concentrated cost measures), legislators will often seek to delegate regulation of the group to an agency. If the legislation distributes benefits at the expense of a concentrated group, the cost payers will tend, over time, to organize themselves effectively to influence the agency. This phenomenon, together with natural bureaucratic forces, results in what is often called "agency capture."<sup>46</sup> (If the legislation concentrates both benefits and costs, the agency will become a battleground for the competing interests.) Table 1, below, summarizes the demand and supply patterns for legislation.

### C. *The Inefficacy of Proceduralism*

Madison anticipated both that majorities might be unstable and that interest groups might raid the public fisc, though public choice theory suggests that he severely underestimated the potential for havoc. But Madison's safe harbor, the one that endeared him to pluralists in the 1950's, was proceduralism. Temporary majorities and factionalism could be controlled by procedural structures such as large constituencies, bicameralism, and the veto. Public choice theory does provide some support for Madison's belief that the problems of collective decisionmaking can be ameliorated by structures of legislative procedure, but on the whole public choice theorists are more pessimistic about the efficacy of proceduralism than Madison, and much more pessimistic than Madison's heirs of the 1950's.

---

<sup>45</sup> One mild anomaly of interest group theory is why distributed benefit, concentrated cost statutes should be enacted at all, since there ought in most cases to be weak demand and organized opposition to such laws. In the main, the public choice response harkens back to the Buchanan and Tullock game theory argument that large groups will typically want to press costs onto a smaller group. See *supra* pp. 284-85.

<sup>46</sup> The seminal work is Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971); see also A. Downs, *Inside Bureaucracy* (1967); W. Niskanen, *Bureaucracy and Representative Government* (1971); Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & Econ.* 211 (1976); Peters, *Insiders and Outsiders: The Politics of Pressure Group Influence on Bureaucracy*, 9 *Admin. & Soc'y* 191 (1977).

TABLE 1  
AN INTEREST GROUP MODEL OF LEGISLATION

<b>Distributed benefit/ distributed cost</b>	<b>Distributed benefit/ concentrated cost</b>
Usually little interest group formation on issue. Unless there is strong consensus on issue, likely legislative action is <i>no bill</i> or <i>symbolic action</i> . If law is enacted, the legislature will generally fail to monitor the legislation's performance effectively, or to update it.	Opposition groups tend to be stronger than support ones. Conflictual demand pattern: <i>no bill</i> or delegation to agency <i>regulation</i> . If the latter, agency tends to become "captured" over time by interests of the regulated group.
<b>Concentrated benefit/ distributed cost</b>	<b>Concentrated benefit/ concentrated cost</b>
Often strong interest group activity supporting action. Consensual demand pattern if public is ill-informed: <i>Distribution</i> of benefits to organized interest(s) or <i>self-regulation</i> for the organized interest. Classic rent-seeking legislation.	Interest groups will tend to form on both sides of issue. Conflictual demand pattern: <i>no bill</i> or delegation to agency <i>regulation</i> where the organized interests can continue their clash.



For example, Buchanan and Tullock agree with Madison that bicameralism will discourage rent-seeking legislation, because proposals that must gather majorities in two different chambers having distinct constituencies will be harder to obtain and/or more costly.<sup>47</sup> They admit, though, that the overlapping constituencies of the Senate and the House of Representatives dilute the advantage of bicameralism and that, among the constituencies of the Senate, farmers and western states are overrepresented.<sup>48</sup> Indeed, the thrust of their analysis is that the procedural protections that might have been appropriate in 1789, when the country was much smaller and government more limited, are wholly inadequate today. Hence, new constitutional rules should be developed to reduce the rent-seeking potential for government.<sup>49</sup>

Public choice insights support an even more pessimistic analysis, a veritable paradox of proceduralism: procedural obstacles to legislation will exacerbate the tendency of the legislature not to pass public goods legislation, but will not much impede its ability to pass rent-seeking laws. This is because procedural obstacles often prove deadly for conflictual or weak-demand patterns (the context in which laws for the public benefit usually emerge). In contrast, procedural obstacles do little to impede consensual demand patterns (where laws bring concentrated benefits and dispersed costs).

Current efforts to balance the federal budget illustrate the first prong of the paradox—the obstacles to public goods legislation raised by procedural requirements. Proposals to raise general tax revenues and cut federal spending have generated an unusual amount of demand, in part because the potential consequences of the deficit are alarming to several well-organized groups (e.g., bankers). Yet no significant inroads were made between 1982 and 1987, due to procedural hurdles: hostility in committee, threatened presidential vetoes, potential filibusters. Procedural hurdles not only kill most distributed benefit legislation, but also dilute the measures that somehow get through. For example, the Civil Rights

---

<sup>47</sup> See J. Buchanan & G. Tullock, *supra* note 31, at 233-48.

<sup>48</sup> *Id.* at 246-48.

<sup>49</sup> *Id.* at 286-91. See Buchanan, *Constitutional Restrictions on the Power of Government*, in *The Theory of Public Choice—II*, *supra* note 4, at 439; Tullock, *The Backward Society: Static Inefficiency, Rent Seeking, and the Rule of Law*, in *The Theory of Public Choice—II*, *supra* note 4, at 224.

Act of 1964<sup>50</sup> broadly prohibits "discrimination" based on race, color, national origin, and (as to employment) sex. Notwithstanding strong demand for this legislation, including proposals by three Presidents, it took eight years of intense public effort to pass a meaningful statute. Even then, the law was riddled with compromises (especially in the employment title) that detracted from the Act's anti-discriminatory purpose, but which were probably necessary to attract the support needed for the legislation.<sup>51</sup>

A classic example of the second prong of the paradox—the inability of procedures to prevent rent-seeking—is the Smoot-Hawley Tariff Act of 1930,<sup>52</sup> the history of which mocks Madisonian procedural protections.<sup>53</sup> Essentially, the unreasonably high tariff schedules were drafted by industry beneficiaries and touched up by Congress.<sup>54</sup> Of course, the rent-seeking process is rarely so baldly apparent as it was in the case of the Smoot-Hawley Tariff Act. Typically, an interest group or groups seek to avert public debate by cloaking their rent-seeking objectives in public-regarding terms; hence, they raise a public justification for distributing benefits to them and, by bearing that justification before them, can smooth over opposition. For example, the Agricultural Marketing Agreement Act of 1937<sup>55</sup> essentially permits regional milk producers to agree on minimum prices, enforced by the Secretary of Agriculture. Although this seems a classic rent-seeking scheme, it was justified to Congress as necessary to avoid the low farm prices that arguably contributed to, and deepened, the Great Depression.

---

<sup>50</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982)).

<sup>51</sup> For background on the Civil Rights Act, see B. Whalen & C. Whalen, *The Longest Debate: A Legislative History of the Civil Rights Act* (1985); see also W. Eskridge & P. Frickey, *Statutes and the Creation of Public Policy* 2-28 (1987).

<sup>52</sup> Law of June 17, 1930, ch. 497, 46 Stat. 590 (repealed in part and amended 1974).

<sup>53</sup> See E. Schattschneider, *Politics, Pressures and the Tariff* (1935). That study is summarized in W. Eskridge & P. Frickey, *supra* note 51, at 40-46.

<sup>54</sup> The key to the measure's enactment was a process of "reciprocal noninterference" by the interest groups involved. That is, furniture makers tacitly agreed not to oppose higher lumber tariffs in return for the lumber industry's active support for its own increases. Because ordinary consumers were effectively marginalized in the process, and the relevant interest groups were happy to logroll, the demand configuration was consensual. The tariff bill breezed through committees, sailing over the procedural hurdles that are supposed to ensure public deliberation. See E. Schattschneider, *supra* note 53, at 37-52, 222 n.5.

<sup>55</sup> Ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-674 (1982 & Supp. IV 1986)).

Opposition was diffused by a public-sounding justification, and the rent-seeking ills of the statute have only become apparent over time.

Even when rent-seeking legislation does arouse some legislative opposition (producing a more conflictual demand pattern), legislative procedures may be manipulated to sidestep the opposition.<sup>56</sup> The support of key committee and/or leadership figures can carry the legislation past otherwise troublesome opposition. Manipulation of the procedural safeguards is also possible if critical committees are stacked with allies of the important interest groups. Most members of Congress are assigned to their committee of choice.<sup>57</sup> The committee they seek is often one where they can cater to the needs of their constituencies, especially organized constituencies. Hence, committees may be, and frequently are, dominated by a narrowly interested group of representatives: the Agriculture Committee by representatives of farmers, the Energy Committee by those with ties to energy producers, and so forth. To the extent that these committees control the agenda, which they often appear to do,<sup>58</sup> they can produce systematically biased results. This is more of the Madisonian nightmare.

An example of this phenomenon is section 1323 of the Alaska National Interest Lands Conservation (Alaska Lands) Act of 1980.<sup>59</sup> The statute generally transferred substantial portions of federal land in Alaska to the state; a bill compromising the concerns of the state, industry, and environmentalists passed the House.<sup>60</sup> In Senate committee, a western senator proposed an

---

<sup>56</sup> The most complete examination of the manipulability of congressional procedures is T. Sullivan, *Procedural Structure: Success and Influence in Congress* (1984), and the points made in text were suggested to me by that work.

<sup>57</sup> See Gertzog, *The Routinization of Committee Assignments in the U.S. House of Representatives*, 20 Am. J. Pol. Sci. 693 (1976).

<sup>58</sup> See Denzau & MacKay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 Am. J. Pol. Sci. 740 (1983) (committees have substantial power over the legislative agenda and resource advantages over likely opponents).

<sup>59</sup> Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended in scattered sections of 16 and 43 U.S.C.).

<sup>60</sup> On May 16, 1979, the House of Representatives passed H.R. 39, the bill addressing Colorado wilderness lands. However, the original text of H.R. 39 had been replaced by an amendment in the nature of a substitute. The substitute amendment, offered by Representative Udall of Arizona, was originally the text of H.R. 3651, a measure supported by the House Committee on Interior and Insular Affairs. See 125 Cong. Rec. 11,051-128, 11,457-59 (1979).

amendment (section 1323) apparently designed to grant easements by necessity to private landowners surrounded by federal forest or public lands anywhere in the United States.<sup>61</sup> The amendment was a great giveaway of federal property interests to western landowners and likely could not have passed the more environmentally concerned House on its merits,<sup>62</sup> nor would it have been approved by President Carter had it stood alone. But the provision was added at the last minute to the complicated bill and was swept through with virtually no public examination.

Although the interest group model of the legislative market is necessarily hedged with caveats and expressed in terms of probabilities, its general thrust is pretty grim. The legislative market is one that works badly. The public goods that government ought to be providing—especially distributed benefit, distributed cost measures—are seldom passed by the legislature, because demand for them is usually not strong and legislators gain too little from sponsoring them. Even if such laws are enacted, they will not remain useful for very long, because the legislature will often fail to update them to address new forms of the problem or to reflect changed national policies.

Conversely, rent-seeking statutes—primarily, concentrated benefit, distributed cost measures—seem inevitable. This is most distressing, because of the significant social costs imposed by such statutes.<sup>63</sup> First, rent-seeking legislation typically creates costs,

---

<sup>61</sup> The amendment was offered by Senator Melcher, of Montana. See *Montana Wilderness*, 655 F.2d at 956 n.8. See generally *id.* at 955-57 & nn.5-11 (legislative history of § 1323); S. Rep. No. 413, 96th Cong., 2d Sess. 310 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 5070, 5254 (discussion of the section). It should be noted that the report of the Senate committee, cited *supra*, reversed its analyses of §§ 1323 and 1324; its analysis of § 1324 is, therefore, here apposite. See *Montana Wilderness*, 655 F.2d at 955 n.6.

<sup>62</sup> For one thing, the federal giveaway would have been critically scrutinized by the House Committee on Interior and Insular Affairs. The chair of the committee (Morris Udall of Arizona) and a substantial proportion of the committee's Democrats in 1980 were ardent environmentalists who would certainly have been skeptical of a sweeping *national* forfeiture of federal rights. See generally M. Barone, G. Ujifusa & D. Matthews, *The Almanac of American Politics 1980* (1979). Barone, Ujifusa, and Matthews looked to a key 1978 vote on Alaska wilderness protection as a measure of each representative's stand on environmental issues. Among the members of the Interior and Insular Affairs Committee in 1980, 19 (including 17 Democrats) voted in favor of the wilderness protections in 1978, and 11 (5 of whom were Democrats) voted against the protections. See *id.* at xxi, 988.

<sup>63</sup> See *Towards a Theory of the Rent-Seeking Society* (J. Buchanan, R. Tollison & G. Tullock eds. 1980) (especially the contributions by Krueger, McCormick and Tollison, and

which are accrued by the benefited group and imposed on society. The special interest, however, usually squanders virtually all of its benefit on efforts to obtain the rent-seeking legislation, thus leaving society with a complete deadweight loss. Second, as rent-seeking behavior increases, it is not only the interests *seeking* benefits that must expend resources. Unregulated interests must also move defensively, expending resources to resist rent-seeking that might hurt them. This only broadens the social loss. Third, and most significantly, the prospect of regulation itself creates social loss: a rent-seeking society will systematically tend to divert resources from their most efficient uses if—as is most often the case—those uses are rendered less attractive by regulation.

## II. POLITICS WITHOUT ROMANCE: PUBLIC CHOICE THEORY'S IMPLICATIONS FOR STATUTORY INTERPRETATION

If one accepts the public choice critique of the Madisonian reconciliation, how should one approach statutory interpretation? Merely rejecting the Madisonian tradition does not establish that courts should go beyond the archeological approach. For example, one can maintain that courts should ferret out and enforce the original “devil’s bargains” embodied in statutes, based upon a strong adherence to legislative supremacy. Public choice theory only requires candor in recognizing that the legislative policy is often fragmentary and irrational. Indeed, Professor Buchanan’s work on the role of the “contractarian judge” on the whole assumes that statutory interpretation simply enforces the original bargains,<sup>64</sup> and Judge Posner’s early articles on statutory interpretation reflected a similar view.<sup>65</sup>

---

Tullock); Corcoran & Karels, *Rent-Seeking Behavior in the Long-Run*, 46 *Pub. Choice* 227 (1985); Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *Am. Econ. Rev.* 291 (1974); Posner, *The Social Costs of Monopoly and Regulation*, 83 *J. Pol. Econ.* 807 (1975); Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 *W. Econ. J.* 224 (1967); see also Macey, *Constitutional Ordering*, *supra* note 8, at 474-85 (describing the public choice literature in greater detail).

<sup>64</sup> See J. Buchanan, *Contractarian Political Economy and Constitutional Interpretation* (draft, prepared for a session of the American Economic Association, Chicago, Ill., Dec. 1987) (copy on file with the Virginia Law Review Association).

<sup>65</sup> See Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875 (1975) (arguing that the archeological approach to statutory interpretation is consistent with interest group politics); Posner, *Economics, Politics*, *supra* note 5; Posner, *Statutory Interpretation*, *supra* note 5.

Although public choice theory is logically compatible with the archeological approach, the systemic legislative dysfunctions it exposes make one restive. The current literature applying public choice theory to statutory interpretation reflects that uneasiness. Judge Posner's more recent work, for example, posits that the archeological approach has little to contribute to the interpretation of older, generally phrased statutes such as the Sherman Act.<sup>66</sup> These statutes, Judge Posner argues, ought to be interpreted in a common law fashion. If Congress drops an important problem in the judiciary's lap, with scant instructions on how to deal with it, then it makes sense as a matter of policy for courts simply to make law case-by-case, according to what seems reasonable.<sup>67</sup> Most of the statutes Judge Posner would call "common law statutes" are distributed benefit, distributed cost statutes. His liberal interpretation of such statutes makes public choice sense, because these are precisely the statutes that Congress will generally fail to update to reflect modern policy developments.

A limitation of Judge Posner's theory is that it only attacks the first public choice dysfunction—the failure of the legislature to update public interest laws—but not the second, and more troubling, dysfunction—the existence of too many rent-seeking laws. Judge Easterbrook's theory, on the other hand, is concerned about this second dysfunction. His seminal article on statutory interpretation argues that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process," preferably through express textual treatment.<sup>68</sup> Although Judge Easterbrook has not pursued the implications of his theory,<sup>69</sup> its exacting textualism

---

<sup>66</sup> See Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *Harv. L. Rev.* 761, 774-77 (1987); Posner, *Legal Formalism*, *supra* note 5.

<sup>67</sup> Posner, *Legal Formalism*, *supra* note 5, at 199-201.

<sup>68</sup> Easterbrook, *Statutes' Domains*, *supra* note 6, at 544; see also *id.* at 544-45 (this approach overlaps the "clear statement" principle of statutory construction).

<sup>69</sup> Indeed, Easterbrook, *Foreword*, *supra* note 6, retreats from the theory of the earlier article. Following Judge Posner, Judge Easterbrook urges liberal interpretation of "public interest statutes" such as the Sherman Act. As to "private interest statutes," a judge "implements the bargain as a faithful agent but without enthusiasm; asked to extend the scope of a back-room deal, he refuses unless the proof of the deal's scope is compelling." *Id.* at 15. In this later article, Judge Easterbrook seems more willing to allow "devil's bargains" to be enforced than he was in the first article. See *id.* at 49-51.

provides one useful way to limit rent-seeking legislation. By refusing to validate interest group deals not manifested in the clear statutory text, this approach would hinder the enforcement of backdoor bargains, and would force interest groups to spend more time and money to procure explicit statutory language sanctioning their deals.

Like Judge Posner's approach, however, Judge Easterbrook's falters when a court, rather than offering *its own* interpretation of a statute, is reviewing an *agency's* interpretation of the statute in question. Most statutory interpretation today is, after all, done by agencies and departments, with courts serving merely as "supervisory institutions," rather than as "primary implementation institutions."<sup>70</sup> The original Posnerian deal in such statutes typically is to delegate extensive rulemaking power to agencies or departments; the operative Easterbrookian language in these cases therefore generally gives agencies (and *not* the courts) the power to create and revise a form of common law. Yet public choice theory teaches us that, over time, these agencies and departments are subject to powerful rent-seeking pressures. Is there any way for courts to counterbalance this? Professor Macey's theory offers one useful response to this problem. He argues that courts should enforce the original public-regarding justifications for a statute, as a check against interest groups' subsequent efforts to manipulate the statute to serve their private ends.<sup>71</sup>

What seems most striking about the dialogue among public choice-inspired legal theorists writing about statutory interpretation is their piecemeal abandonment of the archeological approach. Indeed, each of the legal theorists contributes a distinct, valuable insight, suggesting interpretive methods that courts might use to offset some aspect of the legislative dysfunction suggested by public choice. The insight of each scholar can be expressed in terms of the demand and supply configurations developed in Part I of this Article. Judge Posner's common law approach is often a useful strategy for interpreting distributed benefit, distributed cost statutes, which serve public policies but are susceptible to evasion and

---

<sup>70</sup> E. Rubin, *Legislation in the Administrative State* (draft Sept. 1987) (copy on file with the Virginia Law Review Association); see Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1985).

<sup>71</sup> See Macey, *Public-Regarding Legislation*, *supra* note 8, at 250-52.

obsolescence because they are seldom updated by Congress. Judge Easterbrook's exacting textualism is a legitimate strategy for narrowing the damage done by concentrated benefit, distributed cost (the worst rent-seeking) statutes. Professor Macey's approach is best suited to concentrated cost statutes, which most often create regulatory bureaucracies, because the original articulated public purpose is an elastic concept limiting the evolution of the bureaucracy toward private goals. Cumulatively, these theories can be viewed as different strategies for the theory of "dynamic statutory interpretation" I have defended in an earlier article.<sup>72</sup> Professors Farber and Frickey in this Symposium articulate the core lesson in a related way, arguing that statutory interpretation involves an assessment of the current effects of each possible interpretation, as well as the original legislative expectations.<sup>73</sup> Table 2 outlines a public choice version of dynamic statutory interpretation.

The approach set forth in Table 2 synthesizes the insights of prior theories, and offers different strategies for dealing with different dysfunctions in the legislative-administrative process. The practical virtues of this synthesis make it an approach worth considering, but it shares an overall problem with each of the theories from which it borrows—it fails to explain and justify the institutional division of labor among the courts, Congress, and the agencies.<sup>74</sup> This intermediate, dynamic approach affords the courts significant lawmaking, or lawbending, power. But, given public choice assumptions, do courts have a comparative advantage over Congress and the agencies to assume such a creative role? Even if courts do have a comparative advantage in some respects, what disadvantages might accrue if judicial creativity were openly endorsed? For example, would the dysfunctions of interest group politics simply replicate themselves, moving from legislative

---

<sup>72</sup> See Eskridge, *supra* note 10.

<sup>73</sup> Farber and Frickey argue that the best statutory interpretation is that one that maximizes the product of social value times the probability that Congress intended that very interpretation; as they put it, the rational judge should choose the interpretation —*x*— that maximizes  $p(x) \cdot v(x)$ , where  $p(x)$  is the probability that the interpretation is the one intended by Congress and  $v(x)$  is the value or usefulness of that interpretation. See Farber & Frickey, *supra* note 7, at 462-65.

<sup>74</sup> This Article does not explore the constitutional justifications for dynamic statutory interpretation; for a treatment of that issue, see Eskridge, *supra* note 10.



TABLE 2  
DYNAMIC STATUTORY INTERPRETATION

<b>Distributed benefit/ distributed cost</b>	<b>Distributed benefit/ concentrated cost</b>
Interpret in a common law fashion, limited by the statutory language, updating to reflect changed circumstances. (Similar to Posner's theory.)	Interpret to effectuate stated public purposes and to reflect changing legal or constitutional values, within the frame of ongoing agency implementation. (Similar to Macey's theory.)
<b>Concentrated benefit/ distributed cost</b>	<b>Concentrated benefit/ concentrated cost</b>
Interpret narrowly and refuse to provide special benefits unless clearly required by statute. (Similar to Easterbrook's theory.)	Interpret to effectuate original deal among interest groups effectuating the stated public purposes of the statute within the frame of ongoing agency interpretation. (Similar to Macey's theory.)

chambers to judicial chambers? Contrariwise, if courts *can* make "better" rules than Congress or the agencies, why not go all the way to a free inquiry approach? Or would that approach, too, encounter institutional disadvantages?

These are questions that any general theory of statutory interpretation ought to address, whether inspired by public choice or not. Because public choice theory offers a structured framework for discussing different "constitutional" arrangements for our public institutions and for anticipating dysfunctions,<sup>75</sup> it is surprising that so little has been done—by either legal scholars or economists—to use public choice theory as a basis for exploring the potential consequences of different approaches to statutory interpretation. In the remainder of this Part, I should like to suggest the beginnings of such an inquiry through the use of a public choice thought experiment. Let us consider the intermediate, dynamic approach to statutory interpretation, outlined in Table 2, as a hypothesis competing with the archeological and free inquiry approaches. Public choice theory frames three inquiries by which to compare the competing approaches. First, which approach best reflects the comparative institutional advantages of Congress, the agencies, and courts to make legal rules? Second, what effects would each approach have on the political actors, including interest groups and Congress? Third, what would be the consequences of each approach for the general dynamics of our political system? In undertaking each inquiry, I shall first ask whether the intermediate, dynamic approach has advantages over the archeological approach and, then, whether the free inquiry approach has advantages over the other two.

Unhappily, the questions suggested by public choice theory are more satisfying than the answers. My conclusion below is that the existing theoretical and empirical public choice literature—still in its rudimentary stages—offers no determinative resolution even for this rather simplified thought experiment. The public choice literature does, however, indicate that courts have some comparative advantages over the legislature in making legal rules, because they

---

<sup>75</sup> Public choice literature talks about "constitutional" rules as those setting forth the specific institutional roles and constraints, as opposed to the "positive" rules, which are the products yielded by the institutions operating under constitutional rules. See, e.g., J. Buchanan, *supra* note 64.

are less directly accountable to interest group pressures. Moreover, public choice theory also suggests that a frank, final abandonment of the archeological approach would in practice only marginally reshape our political system. These conclusions, of course, just offer tentative support for the intermediate, dynamic approach, and thus they suggest the need for public choice scholars to develop more sophisticated ways of analyzing these issues.

*A. The Relative Competence of Courts, Legislatures, and Agencies to Make Legal Rules*

The initial—and perhaps the most important—question is whether courts have a comparative advantage over legislatures in creating or updating legal rules. Public choice analysis would assume that courts, like legislatures, are subject to analysis based upon demand and supply incentives. Is there reason to believe that courts will not be susceptible to the same dysfunctions that public choice has highlighted in the legislature? If courts are in fact subject to the same or similar dysfunctions, there seems to be scant reason to prefer the intermediate, dynamic approach to the traditional, more confined archeological approach.

There is a small cottage industry arguing about the relative efficiency of the common law,<sup>76</sup> but few scholars have systematically analyzed judicial behavior from a public choice perspective.<sup>77</sup> Most of the literature supports the proposition that courts tend to create efficient legal rules. An excellent article by Professor Paul Rubin, however, has questioned both that proposition and the strong contrast—consistently made in the literature—between the efficiency of judicial rules and the inefficiency of legislative ones.<sup>78</sup> Citing historical examples, he contends that, as interest groups have been

---

<sup>76</sup> Chapters 13 and 19 of Judge Richard Posner's *Economic Analysis of Law* (3d ed. 1986) argue for the relative efficiency of the common law. See also Landes & Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235 (1979) (adjudication in the courts tends to produce efficient results). Several authors have argued that the common law is efficient because inefficient precedents are litigated more often, e.g., Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65 (1977); Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977), though this has been critiqued in Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. Legal Stud. 139 (1980).

<sup>77</sup> For exceptions, see W. Landes & R. Posner, *The Economic Structure of Tort Law* ch. 1 (1987); G. Tullock, *Trials on Trial* ch. 12 (1980).

<sup>78</sup> See Rubin, *Common Law and Statute Law*, 11 J. Legal Stud. 205, 207 (1982).

able to exert greater influence in the legislative process, they have played an increasingly prominent role in litigation as well. The same concentrated groups that employ lobbyists to secure favorable legislative treatment also typically employ lawyers to obtain favorable judicial treatment. In Rubin's view, much as legislative decisionmaking will favor organized groups, so too will judicial decisionmaking, especially if there is no effective counterpoise to the organized groups. Generally, "the party with the ongoing interest [is] the party to prevail in obtaining favorable court rulings and also favorable legislation (or the lack of effective unfavorable legislation)."<sup>79</sup>

Rubin's argument, however, lacks a hard empirical foundation and relies on controversial examples.<sup>80</sup> Hence, it is not the final word on the influence of interest groups in the judicial arena. Nonetheless, his thesis makes a good deal of public choice sense and seems, at bottom, to be correct in many cases. A recent example of interest groups' impact in litigation was the Supreme Court's leading statutory case last Term. In *Johnson v. Transportation Agency, Santa Clara County*,<sup>81</sup> the Supreme Court reaffirmed its interpretation that title VII of the Civil Rights Act of 1964<sup>82</sup> permits voluntary affirmative action in employment and imposes few, if any, limits on such programs (thus arguably expanding on prior decisions).<sup>83</sup> Justice Scalia, in dissent, chided the Court for sacrificing the interests of a relatively powerless, diffuse group (blue-collar white males) to the political preferences of those powerful, well-organized groups that now support affirmative action (blacks, women, and even many employers and unions).<sup>84</sup> Though Justice Scalia's point is controversial, it is true that the Court's holding created a special exception to the general duty not to discriminate on the basis of race and sex, and that this result was enthusiastic-

---

<sup>79</sup> Id. at 217; see Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

<sup>80</sup> Rubin's main example of modern common law rent-seeking is the unconscionability doctrine. See Rubin, *supra* note 78, at 209-10. A characterization of the unconscionability doctrine as rent-seeking is, of course, controversial.

<sup>81</sup> 107 S. Ct. 1442 (1987).

<sup>82</sup> See Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (1982).

<sup>83</sup> See *Johnson*, 107 S. Ct. at 1449-56; id. at 1466 (Scalia, J., dissenting) (suggesting that *Johnson* further expanded the interpretation of title VII to allow race- and sex-specific plans).

<sup>84</sup> Id. at 1475-76 (Scalia, J., dissenting).

cally supported by the groups that are best organized (in both the legislative and judicial fora) on this issue.

Although Professor Rubin suggests that interest group pressures are sometimes important for judicial lawmaking, he does not posit that courts are always subject to these pressures. Indeed he points out that, where there are symmetrical interests on either side of an issue over time, courts will presumably reach efficient results.<sup>85</sup> It is only when the interests are asymmetrical that his arguments strictly apply. Hence, his thesis may support the application of a dynamic interpretation to distributed benefit, distributed cost statutes, which usually involve symmetrical interests. According to public choice theory, these legal rules will tend to be efficient at their genesis, whether made by the legislature or the courts. Public choice theory points out, though, that these statutes tend to grow obsolete over time, since legislators—too often obsessed with re-election—generally neglect these types of laws and can (because of procedural buffers) all too easily avoid dealing with them. On the other hand, the life tenure of federal judges frees them from having to cater to special constituencies, and the mandatory jurisdiction of federal cases makes it difficult for judges—unlike legislators—to avoid the task of updating statutory policy. Litigants before a court are entitled to a decision, and devices to avoid the merits (such as questions of standing) are invoked only in exceptional cases.

Rubin's article therefore supports the view that courts behaving in a common law manner have a comparative advantage over Congress in updating symmetrical, public goods laws (the first legislative dysfunction). On the other hand, his article raises serious doubts that courts can police against rent-seeking rules any better than Congress can (the second legislative dysfunction). Rubin's argument is, however, overstated in this respect. Although he is surely correct that interest groups are sometimes able to obtain rent-seeking results from courts, courts enjoy three types of structural advantages that suggest that the judiciary will be less prone to rent-seeking results than Congress.

The courts' first advantage lies in demand structures. Although interest groups play a role in the judicial process, it appears that the incidence and influence of group behavior are different in the

---

<sup>85</sup> See Rubin, *supra* note 78, at 214-16.

judicial (in comparison to the legislative) arena. To begin with, there is less likely to be the same high degree of asymmetry of viewpoints in litigation that there routinely is in legislation. Courts generally have at least two parties representing opposing interests in a litigated case, and a court will refuse to hear a case that does not reflect a truly adversarial controversy. Lines of alliance and opposition tend, in the judicial arena, to be both more clearly and more sharply drawn. Thus arrayed in full opposition, parties to a litigation generally do everything possible to bring all their arguments before the court. If a court is not satisfied that the parties have adequately canvassed the arguments, it may seek out—and in any event will often receive—amicus briefs.<sup>86</sup> Hence, although there will often be some bias in the courtroom because one party has greater litigation experience or resources, there is not the utter dearth of opposing viewpoints that one frequently finds in the legislative process.

Additionally, the groups that opt for litigation to effect their policy goals are often more broadly based. "Encompassing groups" (those including many people and usually more broadly representative of the overall public interest) will sometimes have more of a role in litigation than in legislation, because the free rider problem is more easily overcome in litigation. The class action, in particular, is a good way for an encompassing group to be organized on an issue: even if each group member's stake is small, a class action can be organized by entrepreneurial counsel, who can muster the resources to contend effectively with traditionally well-organized groups.<sup>87</sup> Many encompassing groups (e.g., consumer and environmental groups) are active in both the legislative and judicial arenas, and may prefer one arena over another at different times.

---

<sup>86</sup> When the Supreme Court decides an important issue of statutory interpretation such as affirmative action, it typically receives a number of briefs of amici curiae reflecting a variety of viewpoints. This phenomenon also occurs (obviously, less often) in lower courts. See, e.g., *Cartledge v. Miller*, 457 F. Supp. 1146, 1149 (S.D.N.Y. 1978).

<sup>87</sup> Rubin concedes that class actions can sometimes ensure a greater symmetry of interests being represented, but argues that such classes also tend (in other circumstances) to bring about the same inefficient results as do lobbying groups. See Rubin, *supra* note 78, at 219-22. Note that class actions themselves have problems of heterogeneity, so that the class counsel may not adequately represent the interests of all class members. See Rhode, *Class Conflicts in Class Actions*, 34 *Stan. L. Rev.* 1183, 1204-15 (1982). Courts are supposed to monitor this difficulty through the class certification procedures of Fed. R. Civ. P. 23(a)-(b) and the settlement procedures of Fed. R. Civ. P. 23(e).

Access to the judicial arena seems, on balance, to be somewhat easier. The demand analysis is only broadly suggestive: because the judicial process tends to attract greater symmetry of viewpoints, and a greater variety of interests thus gain consideration, it is less likely that one narrow group will be given special treatment not justified by the larger public interest.

Rubin's article deals with demand structures in a careful and intelligent way, and my disagreement with him is only a matter of degree. I think the more substantial problem with Rubin's argument is its failure to consider supply structures for the judiciary. This is the second, and more significant, advantage that courts have over legislatures. Judges' self-interest, unlike legislators', will generally not warp the "supply" or direction of judicial decisions. Lifetime tenure makes judges functionally independent of interest group influence in ways that legislators rarely are. Although judges may be appointed with some political expectations about their performance, there is no way to enforce those expectations.<sup>88</sup> The very nonaccountability of judges gives them—unlike legislators—the freedom to make hard policy choices without falling athwart the dilemma of the ungrateful electorate. Their relative nonaccountability also leaves them with few incentives to cozy up to interest groups, who can in most instances do them no good.<sup>89</sup> In short, precisely because they are not subject to reelection pressures, judges avoid a major force skewing legislators' views.

What does motivate judges? Public choice literature has not explored this issue thoroughly (and certainly not definitively), but

---

<sup>88</sup> Professor Robert Tollison, in *Public Choice and Legislation*, 74 Va. L. Rev. 339, 346 (1988), argues that legislative control of judicial salaries will constrain judicial behavior. I doubt it. Article III of the Constitution prevents Congress from lowering judicial salaries and (implicitly) from discriminating against judges who prove to be too creative. A judge has little incentive not to be creative, because her conduct alone will probably not be enough to stimulate congressional reprisals against the judiciary as a whole. See Macey, *Constitutional Ordering*, *supra* note 8, at 497-98. Also, the federal judiciary has in the last 20 years been increasingly creative, see Eskridge, *supra* note 10, at 1482-97, even though in real dollars the judges' salaries have declined. See, e.g., R. Posner, *supra* note 5, at 36-37 (indicating that federal judges' real salaries have declined as much as 40% since 1969). The salary club does not appear to be a very weighty one.

<sup>89</sup> I say "in most instances" because, though federal judges (unlike legislators) do not need votes and campaign contributions, interest groups can still do judges some good, especially when those groups employ substantial numbers of attorneys. Public praise for, or criticism of, a judge by an interested segment of the bar can enhance or lower the judge's prestige.

several observations are relatively uncontroversial. Judges are apparently not primarily motivated by a desire to maximize leisure time, for the most casual inquiry reveals them to be an industrious lot. Nor does money seem to be a dominant motivation, since federal judges could make much more than their public salary were they to resign and to enter private practice. Promotion is a possible motivation for district court judges, but not for the appellate judges who make the final rulings on matters of statutory interpretation, for the vast majority of those appellate judges see their positions as terminal. Public choice theorists, in their search for the motivations shaping judges' behavior, have emphasized such factors as prestige, the ability to influence the law, and autonomy.<sup>90</sup> How do judges maximize these intangibles? Different strategies are possible, but the most successful ones generally impel judges to avoid rent-seeking results. For example, though a judge might curry favor with certain interest groups so that they would "talk up" the judge within the bar, this strategy would just as likely backfire if it were viewed—and criticized—as action inconsistent with a "judicial temperament."<sup>91</sup> A better strategy for building prestige is to write judicial decisions that appeal to a variety of viewpoints and that cannot be attacked as careless or subjective. Judges seeking to write such decisions generally must heed the views of encompassing groups rather than the views of narrow ones, and must consider the third-party (public) ramifications of legal rules.<sup>92</sup> This strategy, then, lends judges a motivational advantage over legislators, who tend to neglect third-party ramifications.

Rubin also neglects a third theoretical advantage of judge-created rules: process structures. It is hard to evaluate the impor-

---

<sup>90</sup> See R. Posner, *supra* note 76, at 505-07 (judges maximize their influence and the opportunities to impose their legal preferences on parties); Cooter, *The Objectives of Private and Public Judges*, 41 *Pub. Choice* 107, 129 (1983) (judges tend to seek to maximize their "prestige" among litigants).

<sup>91</sup> Contrast the recent confirmation difficulties of Judge Bork, who was perceived by some to have "campaigned" for the Court by appeasing conservative interest groups, with the clear-sledding of Judge Kennedy, who was perceived as "balanced," even if less brilliant than Judge Bork. My impression is that there are not big differences in their respective voting records.

<sup>92</sup> Judge Posner argues that judges will prefer efficient results. Inefficient judicial rules diminish the power of judges, because parties will tend to contract around them and Congress might overrule them. See R. Posner, *supra* note 76, at 505-07.



tance of this factor; it seems to reinforce the supply and demand reasons why courts will be less likely than Congress to adopt rent-seeking rules. Apart from the process advantage arising from courts' relative inability to set their own agenda, the judicial process also works against rent-seeking results because it is open, reasoned, and incremental in its rulemaking.<sup>93</sup> On the whole, there appears to be more systematic and open experimentation in judicial lawmaking than there is in legislative lawmaking, because of the hierarchical structure of the federal court system. Legal issues may first be treated by district and circuit courts, which justify their positions by setting forth rationales in published opinions. If one position is widely acceptable, other courts will follow it, and litigants will tend to stop arguing the issue. If the lower courts split on the issue, the Supreme Court will often resolve it, with the benefit of years of educated discussion of the issue. If the Court makes a mistake in resolving the issue, it is subject to external criticism and subsequent narrowing of the decision, in trial-and-error fashion. Although issues may, of course, similarly percolate in the legislature for extended periods, the attention given an issue in the legislature is, over time, typically less sustained and deliberative than it is in the judicial system.

In short, public choice theory provides tentative theoretical support for the view that judicial lawmaking has important advantages over legislative lawmaking, at least insofar as the judiciary is more likely to update distributed benefit laws to meet changed circumstances. The public choice evidence is more equivocal regarding the proposition that courts are better able to avoid rent-seeking rules, but provides substantial theoretical support for that proposition as well.

But if courts in fact do a better job at avoiding the main public choice dysfunctions that plague the legislature, the question becomes: Why not adopt the pure free inquiry approach to statutory interpretation, in which all law becomes common law? An initial problem with this approach is that the legislature performs a vital role in the creation of public policy, even under the most cynical theory. The incremental nature of judicial lawmaking and the independence of judges from political groups suggest that courts are

---

<sup>93</sup> See S. Burton, *An Introduction to Law and Legal Reasoning* (1985); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1 (1979).

often not as effective as Congress in responding to public problems that require expeditious or detailed action (not to mention public funding and a bureaucracy). Even distributed benefit, distributed cost statutes (which are analogous to the common law and hence are most susceptible to case-by-case development) often require judicial deference to legislative policy judgments to assure that the common law evolution of the statute does not wander too far afield from popular desires.<sup>94</sup>

A free inquiry approach would likely prove most impractical for concentrated cost regulatory statutes, since these require very detailed factfinding and constant updating or fine-tuning that even Congress cannot do—and certainly courts cannot, under their conventional resource limitations. Agencies and executive departments administer these regulatory statutes, and enjoy some of the courts' same comparative advantages over Congress. Bureaucrats are unelected (as judges are), though their lack of lifetime tenure makes them more susceptible to interest group influence. Agency procedures are open, reasoned, and incremental like judicial procedures, though this is an ideal attained in practice less often by agencies than by courts. Notwithstanding these institutional advantages of agencies, public choice theorists argue that an agency tends to be "captured" over time, as interest group demands grow increasingly asymmetrical and the agency loses outside political support and institutional momentum. Although traditional process theorists, such as Professor Colin Diver, have argued for continued judicial deference to agency rules,<sup>95</sup> over time the probable rent-seeking nature of many agency rules would make this approach less attractive to a public choice theorist.<sup>96</sup> Still, the massive factual investigations and political judgments needed to create such rules render a free inquiry approach all but impossible for courts. The intermediate, dynamic approach, which would generally hold

---

<sup>94</sup> For early observations along these lines, see Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383 (1908); Landis, *Statutes and Sources of Law*, in *Harvard Legal Essays* 213 (1934); Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4 (1936).

<sup>95</sup> See Diver, *supra* note 70, at 582-93.

<sup>96</sup> Diver, in my view, underestimates the effect that special interests can and do have on agencies. For example, Diver mentions an unsophisticated form of the "capture" theory, *id.* at 581 n.194, but fails to explore the many and subtle ways agencies are biased or influenced over time by the barrage of special interest pressure. Compare the treatment of similar issues in Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1669, 1760-70 (1975).

agencies to stated public purposes and open procedures, is a plausible public choice compromise position.

A further problem with the free inquiry approach is that it might undermine the checking function of the judiciary. Courts' institutional advantages—as illuminated by public choice theory—are at their strongest when a court is supplementing or checking legislative or administrative dysfunctions, for then the judiciary serves the same role that bicameralism (at least in theory) does: it is an additional filter through which a law or rule must pass. Because courts are responsive to different concerns than are legislatures or agencies, they can sometimes work out problems not caught in the legislative or administrative processes. But if courts were to seize a *primary* role in the lawmaking process, much of the beneficial “filtering” would be lost. If courts adopting the free inquiry approach were to misstep, “review” of those decisions would be left to Congress (through an amendment to the statute) and to the agencies (through shrewd circumvention of the courts' holdings). Both Congress and the agencies are, however, ill-suited to the task. It is generally very difficult to organize sufficient interest in the legislature to “overrule” a court decision, and an agency's enforcement scheme tends to become checkered and incoherent if the agency seeks to maneuver around a central, contradictory court opinion.

Finally, the free inquiry approach would tend to introduce more explicitly political pressure on courts. If the courts were to adopt a primary role in the lawmaking process, there would be great pressure to make them more “accountable,” perhaps through extensive confirmation hearings, novel salary incentives, and the like. The effect of this is unpredictable, but probably some of the advantages of judicial independence would be lost.

#### *B. Impact of Rules of Statutory Interpretation on Congress, Agencies, and Interest Groups*

Assuming that the judiciary is competent to supplement legislative lawmaking, public choice theory asks what would be the institutional and political effects of explicitly adopting a dynamic approach in place of the archeological approach. Would it yield any likely benefits, given the institutional dynamics of our polity? Would those benefits be offset by corresponding disadvantages?

On a theoretical level, one should expect at least three consequences, each of indeterminate magnitude.

First, if courts were to adopt an interpretative strategy aimed at narrowing or circumventing privately motivated statutory "deals," one would expect less of such rent-seeking legislation, because interest groups would have to work harder, both to pass the legislation and to ensure that it survived judicial review.<sup>97</sup> To avoid judicial narrowing, concentrated benefit, distributed cost laws would have to be drafted with greater detail. To avoid judicial enforcement of public-regarding purposes, distributed benefit, concentrated cost laws would have to be drafted or amended to protect interest group capture more openly and explicitly. All this extra detail and explicitness would expose the legislation to greater opposition and risk of defeat, because the public, or other groups, would be better alerted to the costs raised by legislation.<sup>98</sup> Such laws could less easily be sold to an unwitting legislature/populace as public interest measures. And even with more explicit drafting, a private-regarding bargain might still be nullified, forcing the interest group to start all over again. The effect of all this would be to raise the overall costs of rent-seeking legislation—drafting and lobbying costs as well as the risk of total defeat in either the legislature or the courts—to groups seeking a slice of the public pie. Because interest groups seeking rents will generally not spend more than the anticipated reward in order to obtain the statutes they desire, raising the costs of such statutes would discourage some rent-seeking legislation, though obviously not all of it.

Second, one would expect more litigation over statutory issues if federal courts openly abandoned the archeological approach. Interpretation of a statute—once it had broken free of its archeological framework—could substantially reshape the statute's meaning over time. Interest groups would have every incentive to litigate aggressively, in the hopes of reshaping the statute in their favor. This

---

<sup>97</sup> See Macey, *Public-Regarding Legislation*, *supra* note 8, at 224-25. Compare Easterbrook, *Statutes' Domains*, *supra* note 6 (favoring narrow interpretation of rent-seeking statutes) with R. Posner, *supra* note 5, at 292-93 (opposing Easterbrook's position because, by limiting statutes' scopes and lives, it would "make Congress work twice as hard to pass laws").

<sup>98</sup> Professor Gary Becker, in *Public Policies, Pressure Groups and Dead Weight Costs*, 28 *J. Pub. Econ.* 329, 330-36 (1985), sets forth a model of competition among interest groups for political influence, in which perceived deadweight costs generated by rent-seeking will tend to stimulate opposition by taxpayers and other interest groups.

might have some positive effects. Distributed benefit, distributed cost statutes would develop more expeditiously. Concentrated benefit, distributed cost statutes might further be discouraged, because the extra litigation would raise their cost even more.

Unfortunately, this phenomenon would also have ill effects. Organized groups that had lost in the political process would have incentives to take their battles to court. The resulting storm of litigation would draw away societal resources and—given the acknowledged institutional *disadvantages* of the courts in certain contexts—misplace some issues that *are* better handled in Congress or the agencies. Some groups might even bypass Congress altogether, and urge the courts to create special exceptions for them even in distributed benefit statutes. The proponents of affirmative action, for example, did not prevail when the Civil Rights Act of 1964 was written, but later won their point through creative judicial interpretation of the statute.<sup>99</sup> For the reasons described in the previous Section, however, courts ought generally to be able to resist this impulse to carve up statutes.

Third, one would expect some diminishment of non-rent-seeking legislation as a spillover effect of adopting a dynamic approach to statutory interpretation. Not all concentrated benefit, distributed cost legislation is rent-seeking, but it is hard to distinguish between what is and what is not. For example, are the various civil rights laws rent-seeking? Many of their provisions provide concentrated benefits to well-organized racial or ethnic groups and are hard to justify in efficiency terms.<sup>100</sup> On the other hand, the civil rights laws' long-term effort to reduce the large but unmeasurable costs of discrimination suggests that public-regarding reasons of efficiency as well as social justice may justify them as public goods.

The explicit adoption of the intermediate, dynamic approach would, then, open the courts to broader choices, but broader uncertainty, as well. Uncertainty within the courts would, in turn, raise

---

<sup>99</sup> See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

<sup>100</sup> See, e.g., Easterbrook, *Foreword*, *supra* note 6, at 56 & n.141. The minority set-aside provision in the the Public Works Employment Act of 1977, § 103(f)(2), 42 U.S.C. § 6705(f)(2) (1982), has received some attention in this respect. See Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting) (the minority set-aside "creates monopoly privileges in a \$400 million market for a class of investors defined solely by racial characteristics"); W. Eskridge & P. Frickey, *supra* note 51, at 354-58 (legislative history of the set-aside).

costs: litigation would be protracted as the courts groped toward an answer on each issue. Overall costs of *possibly* rent-seeking proposals, therefore, might be increased somewhat, thereby making them harder to enact. Potentially more important (but wholly indeterminate) would be the effect that a dynamic approach to judicial interpretation would have on Congress' willingness to legislate distributed benefit laws. Congress might well be more reluctant to enact such laws, because it could less easily predict what courts would do with them. On the other hand, it is just as possible that Congress would continue to enact them for the same reason it continues to delegate enormous lawmaking authority to agencies: members of Congress could claim to have done something constructive, but by shifting political decisions to another branch, they would avoid offending those groups that ultimately lost the political battle.

This theoretical analysis suggests that the dynamic approach ought to yield less rent-seeking activity in general, but at an indeterminate cost. The cost would not likely be substantial, for a simple practical reason: federal courts already interpret statutes dynamically in many cases, with no discernible ill effects. For example, it is now commonplace for the Supreme Court to interpret generally phrased distributed benefit, distributed cost statutes—the Sherman Act, section 1983, habeas corpus law—in a common law fashion.<sup>101</sup> The Court or one of the concurring Justices is sometimes quite open about the poor fit between the Court's interpretation of such statutes and any original legislative expectations.<sup>102</sup> Notwithstanding this extensive, and relatively open, judicial lawmaking, there has been no hue and cry among legislators or interest groups to stop it. Members of Congress seem happy enough that the Court is making many hard policy judgments and filling in gaps found in these open-ended statutes.

---

<sup>101</sup> See, e.g., *Smith v. Murray*, 106 S. Ct. 2661 (1986) (habeas corpus); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (§ 1983); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985) (Sherman Act); *Jefferson County Pharmaceuticals Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983) (Robinson-Patman Act); *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (Sherman Act); *Carey v. Piphus*, 435 U.S. 247 (1978) (§ 1983).

<sup>102</sup> See, e.g., *Murray v. Carrier*, 106 S. Ct. 2639, 2653-55 (1986) (Stevens, J., concurring); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 487 n.1 (1986) (Stevens, J., concurring); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438-39 (1978) (Burger, C.J.).

Similarly, the Court in some areas goes out of its way to impose a narrowing interpretation on concentrated benefit, distributed cost measures, most notably special exemptions to the antitrust laws.<sup>103</sup> There is little reason to believe that the Court's aggressive stance against antitrust exemptions has curbed useful legislative activity; the Court's hostility, moreover, may have discouraged interest groups from seeking such exemptions in the first place. In contrast, the Court's interpretation of distributed benefit, concentrated cost statutes is all but impossible to characterize, beyond the bland conclusion that any regulatory agency usually gets its way. There has, however, been an array of decisions opening up the administrative process procedurally and overturning errant agency departures from public purposes. Again, the Court's law-making activities have caused no great stir in Congress.

The Court does not routinely consider public choice consequences when it construes statutes (I would fault the Court for this), but many of its decisions reflect an implicit awareness of public choice dysfunctions and a willingness to interpret statutes dynamically. It would mark a significant departure for the Court to abandon completely the archeological rhetoric that still dominates its statutory interpretation. The change would hardly be one to bestir Congress and interest groups, for, even if the intermediate, dynamic approach were adopted, Congress and interest groups could still count on courts to enforce clear statutory language when backed up by supportive legislative history. On the other hand, if the Court went all the way to a free inquiry approach, the consequences would be even less predictable. My guess is that if the Court consistently disregarded statutory language *and* history to curb rent-seeking, charges of *Lochnerism* would surface, and interest groups would seek to have statutory controversies resolved by

---

<sup>103</sup> See, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) (interpretation of statutory exception for "business of insurance"); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 354-55 (1982) (only Congress should create special exemptions to antitrust laws); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (narrow interpretation of "business of insurance"); *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (narrow interpretation of statutory exemption for farmers). For other examples of arguably rent-seeking statutes the Court has interpreted narrowly, see, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (Atomic Energy Act of 1954); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) (Stock-Raising Homestead Act of 1916); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 220-23 (1983) (Atomic Energy Act).

other means, such as unreviewable agency action or arbitration. The reduction in rent-seeking, though welcome, would therefore not likely justify the political turmoil that would sooner or later accompany adoption of a free inquiry approach.

*C. Rules of Statutory Interpretation and the Overall Operation of Our Political System*

A third inquiry focuses on the role of a creative judiciary within our political system. In a recent lecture, Professor Jerry Mashaw argued that a public choice theorist who accepts legislative supremacy will take a rigid view of statutory interpretation greatly at odds with judicial creativity.<sup>104</sup> Such a theorist ought to take a narrowly positivist view of law, emphasize the formal literal text of statutes, and be distinctly reluctant to extend the reach of statutes by judicial gap-filling, Mashaw argued. Indeed, most of the initial wave of influential public choice theorists who have written about statutory interpretation—Judge Posner, Professor Buchanan, and Judge Easterbrook—have tended toward positivism, formalism, or literalism. But this phenomenon is not inevitable. The work of Judge Posner, for example, has moved away from this triad of virtues, and younger scholars using public choice theory to talk about statutory interpretation—Professors Farber, Frickey, and Macey, and I—do not fit the Mashaw description as well as the pioneers do.

The reason for this derives from differing normative assumptions about our political system. The early wave of scholars accepted the normative assumption that government is, and should be, just the sum of interest group politics. For example, even though the celebrated Landes and Posner model explaining the importance of an independent judiciary to the functioning of interest group politics is only a positive model,<sup>105</sup> public choice writers often treat the argument as a normative one.<sup>106</sup> The new wave of

---

<sup>104</sup> J. Mashaw, *Positive Theory and Public Law*, at 24-26 (Rosenthal Lectures, Northwestern Univ. Law School) (draft Feb. 1986) (copy on file with the Virginia Law Review Association).

<sup>105</sup> See Landes & Posner, *supra* note 65, at 894 (purpose of the model is to show how an independent judiciary can be defended "as an essential component in a system of interest-group politics").

<sup>106</sup> E.g., Macey, *Public-Regarding Legislation*, *supra* note 8, at 233-34 (describing the Landes and Posner model as one accepting the Constitution as "designed to promote interest group domination of the legislative process").



scholars finds it anomalous that anyone whose positive vision of interest group government is so pessimistic should be willing to accept the normative proposition that interest group government is all we should aspire toward. Just as Buchanan and Tullock have argued that public choice dysfunctions might be combated through restructuring government decisionmaking rules,<sup>107</sup> we believe that a more aggressive approach to statutory interpretation can ameliorate these dysfunctions.

Does public choice theory give us any insights into this normative debate? I think it does. To understand how the earlier public choice scholars could so readily accept normative pluralism, one can distinguish two different goals of the political market. The immediate goal of a political market may be rational policy, but the longer-range goal of a pluralist system is often defined as moderation and stability.<sup>108</sup> From the long-range perspective, it is not so important that fair results emerge from the political process. Rather, a pluralist might contend that it is more important that all politically salient groups engage in the peaceful political game. This vision of politics certainly militates against accepting the free inquiry model of statutory interpretation. If legislative deals among interest groups, or victories for some groups, were not enforced by the courts, groups would have much less incentive to engage in the stability-enhancing pluralist game. Though many groups would simply transpose the game to the courts, others would drop out and engage in destabilizing activity. This is the pluralist nightmare.

If completely accepted, this argument might support the archeological approach to statutory interpretation. But one cannot accept such an argument without making many controversial historical and political assumptions. To begin with, the historical case for this sort of commitment to a strong form of stability-enhancing pluralism has not been made. There have always been powerfully antipluralist strains in American politics, and modern constitutional scholars argue that the tradition of republican government committed to deliberative rational policy is just as strong a tradi-

---

<sup>107</sup> J. Buchanan & G. Tullock, *supra* note 31, at 283-95.

<sup>108</sup> See Miller, *Pluralism and Social Choice*, 77 *Am. Pol. Sci. Rev.* 734, 734-38 (1983).

tion as the pluralist one.<sup>109</sup> Recall that the framers of the Constitution, particularly the authors of *The Federalist*, were highly ambivalent about the role of "factions."<sup>110</sup> In the *Federalist* No. 10, Madison accepted the inevitability of factions but argued that their pernicious influence could be contained by deliberative legislative procedures. Although Madison did not talk much about the role of courts in dealing with factions, his colleague Alexander Hamilton did. Hamilton, in the *Federalist* No. 78, argued that the judiciary ought to serve as a check on factions, by "mitigating the severity and confining the operation of [unjust and partial] laws. It not only serves to moderate the immediate mischiefs of those which have been passed but it operates as a check upon the legislative body in passing them . . . ."<sup>111</sup>

In political and philosophical circles, a strong form of pluralism is hardly uncontroversial. Its philosophical roots in nineteenth-century atomistic liberalism render it vulnerable now that more community-oriented visions of our polity have emerged.<sup>112</sup> Most importantly, strong pluralism's emphasis on stability over rational policy represents a value-packed choice—favoring existing power and property arrangements over social restructuring, the status quo over reform, and so on.<sup>113</sup> Interestingly, public choice theory itself has a contribution to offer to this value debate.

Professor Olson has recently advanced the thesis that interest group government explains the economic decline of the United States and those other developed countries that have had stable democracies for a long time.<sup>114</sup> In any given country, interest

---

<sup>109</sup> See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 462-506 (1975); Ackerman, *supra* note 11, at 1025-72; Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 17-55 (1986).

<sup>110</sup> See generally D. Epstein, *supra* note 11.

<sup>111</sup> *The Federalist* No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961).

<sup>112</sup> See M. Sandel, *Liberalism and the Limits of Justice* (1982) (communitarianism); Michelman, *supra* note 109 (republicanism).

<sup>113</sup> See *The Bias of Pluralism* (W. Connolly ed. 1969); Cunningham, *Pluralism and Class Struggle*, 39 Sci. & Soc'y 385 (1975-76). Even many pluralist thinkers reject the strong version of the theory for these reasons. See, e.g., R. Dahl, *Dilemmas of Pluralist Democracy* 40-43 (1982).

<sup>114</sup> Olson published the thesis as a book, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (1982), but the thesis circulated as an unpublished paper for several years before that. The paper was the subject of a symposium, the results of which were published as *The Political Economy of Growth* (D. Mueller ed. 1983) [hereinafter *Economy of Growth*].

groups will form asymmetrically, which means that the interests of many will go unrepresented by any organized group, and that the groups that do form will have widely varying degrees of political influence. Stable societies with unchanged boundaries—such as the United States—tend to accumulate more interest groups and interest group coalitions over time. This has disastrous consequences for the society, because the proliferation of interest group activity (1) confers benefits on well-organized groups at the expense of the public, often reallocating resources to inefficient uses; (2) deflects society's attention from productive endeavors to efforts to participate in distributional politics; and (3) contributes to cumbersome regulations, which over time impede innovation both by discouraging the development of new technology and by raising barriers to the efficient diffusion of technology. Olson argues that this is what is now occurring in the United States, and that this is the main reason Japan and West Germany (whose interest group structures were wiped out in World War II) have shown higher growth rates in the last twenty years.

Olson's thesis has generated a great deal of controversy. Some scholars object that Olson exaggerates the rent-seeking features of government in the United States,<sup>115</sup> while others contend that his explanation is unpersuasively unidimensional.<sup>116</sup> On the other hand, there is empirical support for his general proposition that a stable interest group society is not a healthy one.<sup>117</sup> At the very

---

<sup>115</sup> See Becker, *supra* note 98, at 344-45 (there is more competition among interest groups than Olson admits, and large subsidies to groups will stimulate taxpayer resistance).

<sup>116</sup> For example, there may be societal and cultural reasons for Japan's and Germany's economic success (both countries were industrializing rapidly before the war) that cannot be rigorously tested.

<sup>117</sup> Particularly strong support can be found in Weede, *Democracy, Creeping Socialism, and Ideological Socialism in Rent-Seeking Societies*, 44 *Pub. Choice* 349 (1984). Other empirical tests supporting Olson's thesis include Choi, *A Statistical Test of Olson's Model, in Economy of Growth*, *supra* note 114, at 57; Maitland, *Interest Groups and Economic Growth Rates*, 47 *J. Pol.* 44 (1985); Murrell, *The Comparative Structure of the Growth of the West German and British Manufacturing Industries, in Economy of Growth*, *supra* note 114, at 109; Murrell, *An Examination of the Factors Affecting the Formation of Interest Groups in OECD Countries*, 43 *Pub. Choice* 151 (1984). A test not supporting Olson's thesis can be found in Pryor, *A Quasi-test of Olson's Hypotheses, in Economy of Growth*, *supra* note 114, at 90. Tests suggesting a refined version of Olson's thesis include Asselain & Morrisson, *Economic Growth and Interest Groups: The French Experience, in Economy of Growth*, *supra* note 114, at 157; Lehner, *Pressure Politics and Economic Growth: Olson's Theory and the Swiss Experience, in Economy of Growth*, *supra* note 114, at 203.

least, Olson's thesis places normative pluralism on the defensive. It explores some of the normative consequences of public choice theory's gloomy vision and turns the case for pluralism against itself. Rather than being an unalloyed good, stability is shown to be the seed of society's decay. A vibrant society is not one that sacrifices everything for stability and, apparently, it is not one that uncritically accepts pluralist premises.

The public choice indictment of the strong form of pluralism is, of course, a many-edged sword. It may discredit the archeological approach to statutory interpretation, but it provides equally good reasons to adopt the free inquiry approach, in which rent-seeking statutes are simply ignored in favor of the common law. If legislative and administrative rules are presumptively rent-seeking, why not get rid of them, root and branch? This public choice position is as logical as it is radical, but thus far only Professor Richard Epstein has broached it in the legal literature.<sup>118</sup> Perhaps other public choice thinkers are reluctant to compromise our political traditions that drastically, suggesting that the pluralist values of stability, moderation, and so forth are not easily abandoned. (Note that, though Olson does not treat Third World countries in any detailed way, one political lesson learned there is that chronic instability can be yet more deadly to a polity than stagnating stability.)

In summary, the public choice lines of inquiry do not give us definite answers about the "optimal" approach to statutory interpretation, but they do offer three interesting, even if tentative, conclusions. First, public choice theory provides quite substantial justification for judicial efforts to address the first legislative dysfunction—the problem of statutory updating—by following a common law approach to distributed benefit, distributed cost statutes. Second, public choice theory provides some, though equivocal, evidence that courts can ameliorate the second dysfunction by narrowly interpreting rent-seeking statutes and by adopting public-regarding interpretations of regulatory statutes. Third, public choice theory suggests that more judicial lawmaking will change the dynamics of our political system, probably not in ways that can be

---

<sup>118</sup> See R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 711-15 (1984).

precisely anticipated or measured. But if our polity is to preserve its vitality, this is a set of risks we ought to be willing to assume.

### III. PUBLIC CHOICE WITHOUT ROMANCE: STILL ANY IMPLICATIONS FOR STATUTORY INTERPRETATION?

Thus far, the argument has been that the dreary picture of statutory law painted by public choice theory can be brightened—at least somewhat—by adopting an approach to statutory interpretation oriented more toward current policies and problems. For many of the same reasons, public choice theory provides some tentative arguments against any purely archeological approach to statutory interpretation. The discussion has been premised upon the assumption that public choice theory offers an accurate vision of legislation, which can be usefully deployed by legal scholars and judges. This may be what economists call a “strong” (i.e., unrealistic) assumption. The critics of public choice contend that its theory is hard (if not impossible) to use determinatively, that it offers an inaccurate vision of society, and that it can be deeply misleading.<sup>119</sup>

First (the critics urge), the public choice theorists have overstated their claim that politics can be reduced to a kind of exact “science.” Although public choice articles are replete with magic mathematics and deductive analytics, the critics contend that the analyses are not as rigorous as they appear to be. For example, the central concept of “rent-seeking” is very fuzzy in its application. Not all legislation sought by interest groups is, in fact, rent-seeking. The railroads’ exemption from antitrust regulation may be rent-seeking, for it frees an industry to form price cartels. But the exemption may instead be an efficient rule (as the industry argues), because railroads need to exchange price information in order to have a unified national set of rates. Conversely, though laws that protect the environment appear to be public goods rules, if they go “too far” they may simply be the product of rent-seeking by elites who are imposing the costs of *their* enjoyment of the environment on others, outside the elite group. As these examples show, clever economists can almost always devise arguments for or against any measure. How, then, are lawyers and judges, with only

---

<sup>119</sup> See, e.g., S. Kelman, *Making Public Policy: A Hopeful View of American Government* 234-39 (1987); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873, 901-06 (1987); J. Mashaw, *supra* note 104.

a rudimentary understanding of economics, to apply public choice models?

Second, the critics charge that the public choice premise that legislation is just a series of transactions between reelection-minded legislators and private-seeking interest groups is oversimplified. On the supply side, legislators' behavior is influenced by factors other than the raw desire to be reelected. Though legislators do have strong incentives to be reelected, institutional process scholars argue that legislators' behavior is also influenced by a rich array of other factors, including their desire to contribute to sound policy and to gain respect within the legislature.<sup>120</sup> Contrary to the public choice theorists' assumptions, many scholars have been struck by the significance of ideology and "public spirit" in the legislature.<sup>121</sup> On the demand side, the most comprehensive study of interest groups concluded that their influence on legislation ranged from "determinative" to "insignificant," depending upon the context in which the groups were working.<sup>122</sup> Case studies of legislation have generally found that public figures (especially the President) are much more important than private interest groups in setting the nation's political agenda.<sup>123</sup>

Public choice theorists' response to this criticism is that their theory can get away with simplified premises if it yields superior predictive results.<sup>124</sup> The critics, however, say that it does not.<sup>125</sup> Although public choice theory seems to be a reasonable explanation for the Smoot-Hawley Tariff Act, it is a less satisfying explanation for many recent statutory developments, including the Civil Rights Act of 1964, the deregulation movement of the 1970's and 1980's, the evolution of environmental law statutes, and (most re-

---

<sup>120</sup> R. Fenno, *supra* note 43, at 1; see Farber & Frickey, *supra* note 119, at 888-90.

<sup>121</sup> See, e.g., S. Kelman, *supra* note 119, at 58-66; A. Maass, *Congress and the Common Good* (1984).

<sup>122</sup> K. Schlozman & J. Tierney, *Organized Interests and American Democracy* 317 (1986). The authors of the study concluded that interest groups tend to be most influential when (1) they are trying to block rather than enact legislation, (2) the issues have low public and media visibility and are being addressed in forums friendly to the groups, and (3) they can count on support from public sentiment, other relevant groups, and/or key political figures. *Id.* at 314-17.

<sup>123</sup> See J. Kingdon, *Agendas, Alternatives, and Public Policies* 72-74 (1984).

<sup>124</sup> See D. Mueller, *Public Choice* 5 (1979).

<sup>125</sup> See Farber & Frickey, *supra* note 119, at 895-901; Panning, *Formal Models of Legislative Processes*, in *Handbook of Legislative Research* 669 (G. Loewenberg, S. Patterson & M. Jewell eds. 1985).

cently and dramatically) the tax reform enacted in 1986.<sup>126</sup> Public choice theory is strikingly insufficient in its ability to explain why these statutes were enacted at all: the Civil Rights Act was passed by legislators who faced great electoral risks in voting for such a strong and sweeping law, deregulation flew in the face of public choice arguments that regulated groups will continue to receive protection, and the environmental and tax reform statutes were opposed by the classic array of omnipotent interest groups. In each case, ideological and historical factors seem essential to an understanding of what happened. Public choice theory is only part of the overall story.

Building on the first two, the third criticism of public choice theory is that its view of politics as a simple marketplace distorts analysis by implicitly denying the capacity of law and politics to articulate national values and to transform preferences.<sup>127</sup> The Civil Rights Act can be analyzed in public choice terms, either as a measure intended to eliminate the inefficiencies caused by discrimination, or as a rent-seeking measure that benefits various minorities. But this mechanistic view trivializes the Act, for its enactment and subsequent history are incomprehensible without an understanding of how our society was transformed by the public debate. This is not only positively true, but normatively important. By analyzing the political process as a relatively narrow calculus in which individuals seek only their own advantage, public choice may imperil the fragile norm of "public spirit" that informs a vigorous body politic.<sup>128</sup> The most realistic view of politics may be one

---

<sup>126</sup> For anti-public choice theory accounts of these statutes, accounts that emphasize the importance of public opinion, personalities, historical accident, and deliberative debate, see J. Birnbaum & A. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform* (1987) (Tax Reform Act of 1986); J. Kingdon, *supra* note 123, at 9-13 (deregulation measures in the late 1970's); B. Whalen & C. Whalen, *supra* note 51 (Civil Rights Act); Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. Econ. & Org. 313, 333-35 (1985) (clean air legislation).

<sup>127</sup> See Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986); J. Mashaw, *supra* note 104.

<sup>128</sup> Compare Kelman, "Public Choice" and Public Spirit, *Pub. Interest*, Spring 1987, at 80, 93-94 ("Cynical descriptive conclusions about behavior in government threaten to undermine the norm prescribing public spirit.") with Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 Va. L. Rev. 179 (1988) (defending public choice as more realistic than a public-spirited view of governance). See also J. Mashaw, *supra* note 104, at 3-4 ("Beliefs about states of the world and about the possibilities for molding human conduct influence, not just how we pursue our ends, but what ends we choose.").

in which people act in both selfish and public-spirited ways, and in which politics involves issues of interest, but also (and perhaps at the same time) issues of value. Any theory that denies the possibility of both behaviors obscures reality.

For the most part, I agree with the critics that public choice theory gives us an incomplete view of the legislative process. The theory does, however, provide an interesting analytic for understanding legislation, and for evaluating strategies for improving it. Public choice theory offers a useful way to think about legislation, precisely because it shows the process at its worst (or what I consider its worst). Though public actors often act in public-regarding ways, and historical/ideological factors play a decisive role in shaping and passing legislation, a great deal of what goes on in the legislative process is captured succinctly and horrifically by public choice theory. Its focus on what can go wrong, and where, makes public choice theory an excellent warning beacon to judicial interpreters. Indeed, the primary legislative dysfunctions identified by public choice theory—a tendency of Congress to neglect general interest statutes and of Congress and agencies to create special rules and benefits for well-organized groups—are borne out by more traditional institutional process studies and theories.<sup>129</sup>

---

<sup>129</sup> Thus, the public choice notion that legislatures spend too little time enacting and updating distributed benefit, distributed cost statutes is supported by Kingdon's garbage can theory. See J. Kingdon, *supra* note 123, at 89-94 (citing Cohen, March & Olson, A Garbage Can Model of Organizational Choice, 17 *Admin. Sci. Q.* 1 (1972)). Because the legislature is an "organized anarchy," things will be accomplished only when a general public problem becomes politically salient at the same time that a well-considered solution is available and the political climate is ripe for change. Although Kingdon is optimistic that the legislature seeks the common good in these statutes, his theory suggests that the legislature will not, and cannot, perform this function very often. See *id.* Other institutional theorists emphasize the procedural hurdles and the generally decentralized power structure in the legislature, which prevent the legislature from acting frequently to address general public problems with up-to-date integrated policy solutions. See, e.g., R. Davidson & W. Oleszek, *Congress and Its Members* (2d ed. 1985) (procedural obstacles); R. Ripley, *Congress: Process and Policy* 4-21 (3d ed. 1983) (decentralized nature of Congress).

Institutional theory supports the public choice insights that legislatures will often avoid or defer hard political choices to agencies (which may become biased in favor of regulated groups), and that legislatures will often distribute advantages to groups at the expense of the public. Scholars such as Randall Ripley and Grace Franklin argue that the decentralized nature of legislative decisionmaking has encouraged policymaking by "subgovernments" consisting of subcommittee legislators, bureaucrats, and lobbying groups interested in particular issues. See R. Ripley & G. Franklin, *Congress, the Bureaucracy and Public Policy* 9-12, 55-66 (3d ed. 1984). Routine legislation (in which the President, the media, and political



Hence, in the complicated world of statutory interpretation, public choice theory can help to alert the interpreter to problems, even if it does not provide a complete theory of interpretation. An analogy that appeals to me is the lighthouse. Its beacon light cannot, of itself, bring the sailor to harbor, but its location and illumination mark the shoals and dangers for the experienced navigator. Public choice theory does that for the judicial interpreter—alerting her to possible biases and inequities in the statutory scheme and to the consequences of various interpretational options. In short, rather than engendering any general theory of statutory interpretation, public choice theory is at present most useful to interpreters as a perspective that can guide creative statutory interpretation away from obvious dangers. Public choice is one source for intelligent judicial inquiry, not a determinative theory. Some of the inquiries for which public choice theory has useful insights are the following:

*Is the statute one that the legislature is likely to update?* If a statute is created as a result of a public-spirited response to a perceived social or economic problem, and it distributes benefits widely, the legislature may well neglect the statute over time, thereby implicating the interstitial, facilitating role of the judiciary. On the other hand, a statute creating concentrated benefits or imposing concentrated costs is more likely to be amended; this type of statute is therefore not as likely to require judicial updating. Thus, judges might be more willing to update (in a common law fashion) a distributed benefit, distributed cost law like the Sherman Act or the Uniform Commercial Code, but not a concentrated benefit, concentrated cost one like the National Labor Relations Act.

*Does the statute entail symmetrical rights and duties, or benefits and costs?* Symmetrical rights/duties or benefits/costs are evidence that the legislative process has worked reasonably well; the Hamiltonian checking function of the judiciary is not, then, implicated. Asymmetrical rights/duties or benefits/costs, on the other

---

parties do not become actively involved) is effectively controlled by these subgovernments, which over time tend to push government policy toward their favored interests. Legislation that is more public-benefiting will typically reflect compromises with these subgovernments and delegation of future policymaking responsibilities to them, often with a similar eventual result.

hand, should alert judges to a statute that may represent advantage-taking: judges should consider the possibility of interpreting such statutes narrowly (especially if the law entails concentrated benefits and distributed costs) or according to an elastic public-regarding purpose (for laws imposing distributed benefits and concentrated costs). The same inquiry might be useful when judges are responding to agency interpretations of regulatory statutes. Does the agency's interpretation expand special subsidies or self-regulation beyond the original statutory entitlement? Does the agency's interpretation undercut the public-regarding justifications for the statute? If so, judges might be less deferential to the agency's interpretations.

*Will one interpretation of the statute penalize people who have no effective access to the political process?* In whatever manner a court interprets a statute with concentrated benefits and costs, the losing side often may obtain legislative reconsideration of what the court has done. This seems useful. The possibility of legislative reconsideration is substantially less, however, if the court's interpretation hurts a diffuse group (such as taxpayers or consumers).

Public choice theory thus does afford the courts some direction, though the complexities of the dynamics of government mean that a public choice analysis should be used as a beacon, a warning of danger, rather than as a determinative guide to statutory interpretation. In light of this more limited role of public choice theory, the simple approach discussed in Part II is not sufficient. Table 3 below outlines the dangers and consequences entailed in the different types of statutes outlined in Part I, and offers suggestions about judicial strategies that might be considered. The remainder of this Part indicates how the public choice perspective might have illuminated the statutory analysis in three recent judicial decisions. In each case the result was curious and the methodology curiouser. Had the Court in each case considered the dangers highlighted by public choice theory, it would have approached the statutes in question differently, and more satisfactorily.

TABLE 3  
DYNAMIC STATUTORY INTERPRETATION  
(REVISED "LIGHTHOUSE" VERSION)

Distributed benefit/ distributed cost	Distributed benefit/ concentrated cost
<p><b>Danger:</b> The legislature's failure to update the law as society and the underlying problem change.</p> <p><b>Response:</b> Courts can help maintain a statute's usefulness by expanding it to new situations and by developing the statute in common law fashion.</p> <p><b>Caveat:</b> Courts should be reluctant to create special exceptions for organized groups.</p>	<p><b>Danger:</b> Regulated groups' evasion of duties; as agencies are "captured" by groups, regulation becomes a means to exclude competition.</p> <p><b>Response:</b> Courts can monitor agency enforcement and private compliance, and can open up procedures to allow excluded groups to be heard. Courts should seek to make the original public goal work.</p>
Concentrated benefit/ distributed cost	Concentrated benefit/ concentrated cost
<p><b>Danger:</b> Rent-seeking by special interest groups, at the expense of the general public.</p> <p><b>Response:</b> Courts can narrowly construe the statute to minimize the benefits. Courts should err in favor of stinginess with public largesse.</p> <p><b>Caveat:</b> Rule of stinginess not applicable if statute really serves a public purpose.</p>	<p><b>Danger:</b> The statutory "deal" often grows unexpectedly lopsided over time.</p> <p><b>Response:</b> Courts can fine-tune the statutory arrangement to reflect new circumstances.</p> <p><b>Caveat:</b> Err against very much judicial updating, unless affected groups are systematically unable to get legislative attention.</p>

### A. The Checkerboard Case

In *Montana Wilderness Association v. United States Forest Service*,<sup>130</sup> the United States Court of Appeals for the Ninth Circuit interpreted section 1323(a) of the Alaska National Interest Lands Conservation (Alaska Lands) Act of 1980.<sup>131</sup> The provision assures that the Secretary of Agriculture "shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof."<sup>132</sup> This provision was a response to federal land policy in the last century. In the nineteenth century, much federal land was distributed to private parties, frequently in return for a public service (such as building the transcontinental railroad). The resulting configuration was often a "checkerboard" pattern, in which federal land alternated with private land, thereby creating mutual enclosure. For almost one hundred years, the Departments of Agriculture and the Interior, which managed federal forest and public lands (respectively), routinely granted private checkerboard holders rights of access across federal land, and expected private holders to give the government access as well. In 1979, however, the Supreme Court held that the federal government did not have a general common law or statutory right of access through private checkerboard parcels,<sup>133</sup> and the Attorney General in 1980 interpreted the Court's decision to deny private holders a right of access through federal checkerboard parcels as well.<sup>134</sup> Section 1323(a) clearly made the Attorney General's opinion inapplicable to federal checkerboard forest lands in Alaska. The issue in *Montana Wilderness* was whether the statutory abrogation also applies to all national forest lands. The Ninth Circuit held that it does.

The language and structure of the statute suggest that section 1323(a) is limited to Alaska lands. Not only are all the other provi-

---

<sup>130</sup> 655 F.2d 951 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982). There is an earlier opinion coming out the other way, No. 80-3374 (9th Cir. May 14, 1981), which was withdrawn by the court. I was on brief for an intervening party defendant in this case.

<sup>131</sup> Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended in scattered sections of 16 and 43 U.S.C.).

<sup>132</sup> Alaska Lands Act § 1323(a), 16 U.S.C. § 3210(a) (1982).

<sup>133</sup> *Leo Sheep Co. v. United States*, 440 U.S. 668, 681-82 (1979).

<sup>134</sup> *Rights-of-Way Across Nat'l Forests*, 43 Op. Att'y Gen. No. 26, at 17-18 (June 23, 1980).

sions of the statute limited to Alaska, but section 1323(b), which is *in pari materia* with section 1323(a) and applies to "public lands" administered by the Department of Interior, by its terms applies only to Alaska.<sup>135</sup> The Ninth Circuit believed that this evidence provided "tentative support" for the view that section 1323(a) applies only to Alaskan lands.<sup>136</sup> Nonetheless, drawing on contemporaneous and subsequent legislative history, the court held that section 1323(a) applies nationwide. The Ninth Circuit noted that the senator responsible for section 1323(a) stated that it would apply nationwide (though his remarks came after the bill passed Congress),<sup>137</sup> and several members of the House made similar statements during that body's consideration of the bill.<sup>138</sup> What was decisive for the court, though, was subsequent legislative history. Three weeks after Congress passed the Alaska Lands Act, the conference committee on an act involving Colorado wilderness areas<sup>139</sup> interpreted section 1323 to apply to Colorado, and therefore deleted a similar provision in the Colorado act as unnecessary.<sup>140</sup>

The Ninth Circuit's interpretation of section 1323(a) is hardly the inevitable one; the statutory language tilts against the court's interpretation, and subsequent legislative history in favor of it. The Ninth Circuit could have written an opinion faithfully invoking the plain meaning rule<sup>141</sup> and wagging its finger against efforts

---

<sup>135</sup> See 16 U.S.C. § 3210(b) (1982). "Public lands" is defined in § 102(3) of the Act, 16 U.S.C. § 3102(3), to apply only to lands "situated in Alaska." The term "National Forest System" is not defined in the Act. All parties to the case agreed that §§ 1323(a) and (b) are *in pari materia*—if one applies nationwide, so should the other. *Montana Wilderness Ass'n*, 655 F.2d at 954.

<sup>136</sup> *Montana Wilderness Ass'n*, 655 F.2d at 955.

<sup>137</sup> 126 Cong. Rec. 30,369-70 (1980) (statement of Sen. Melcher).

<sup>138</sup> See *id.* at 24,911-12 (Rep. Weaver); *id.* at 29,022-23 (Rep. Seiberling); *id.* at 29,262-63 (Rep. AuCoin). Representative Udall, an opponent of this interpretation, set forth his view in *id.* at 29,282-83, but the sincerity of his position was undercut when he joined the conference report for the Colorado wilderness act, quoted *infra* note 140.

<sup>139</sup> See Act of Dec. 19, 1980, Pub. L. No. 96-560, 94 Stat. 3265 (codified in scattered sections of 16 U.S.C.); see also 1980 U.S. Code Cong. & Admin. News (94 Stat.) 3274 (chronicling the passage of the act regarding Colorado wilderness lands).

<sup>140</sup> The Colorado wilderness bill originally had a Senate provision allowing private access through federal checkerboard land, but in conference that was deleted "because similar language ha[d] already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act." H.R. Conf. Rep. No. 1521, 96th Cong., 2d Sess. 20 (1980), quoted in *Montana Wilderness Ass'n*, 655 F.2d at 957.

<sup>141</sup> See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *TVA v. Hill*, 437 U.S. 153, 173-74 (1978).

to bring in subsequent legislative history.<sup>142</sup> Yet it did not. The court wrote an opinion reluctantly enforcing the legislative deal, apparently on the assumption that this was what the majoritarian system somehow "wanted."

Given the substantial indeterminacy of *Montana Wilderness*, the public choice perspective would have been most valuable. Section 1323 is a concentrated benefit, distributed cost statute, apparently added at the behest of western landowning interests. The statute creates asymmetrical rights and duties: private checkerboard holders have a guaranteed right of access across government lands, but the government and its citizenry have no reciprocal right. As is often the case, however, it is not clear whether this apparently rent-seeking statute is really inefficient. The statute arguably solves a classic bilateral monopoly problem: the government and a private checkerboard holder will often both monopolize a good (here, access) that the other wants. Each can charge a monopoly price to the other, but has an incentive to bargain to obtain reciprocal rights. The bargaining process can be quite expensive. By setting forth a right of access for private holders, section 1323 probably reduces those transaction costs and facilitates private land development in the West. The statute focuses on private rights of access because most of the government land is not being actively used (indeed, much is designated as "wilderness" land) and, perhaps, because the government has a superior bargaining position in any event, due to its power of eminent domain.<sup>143</sup>

There are three problems with this story. First, the Departments of Agriculture and the Interior have rarely acted like bilateral monopolists, because they have been sympathetic to western landowning interests. Even after the 1979 Supreme Court decision denying the government guaranteed access across the private checkerboard parcels, the Departments continued to take the position that private parties had guaranteed rights across the government's parcels.<sup>144</sup> Second, in *Montana Wilderness*, those seeking

---

<sup>142</sup> See, e.g., *South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980).

<sup>143</sup> That is, a private holder could not force the government to grant it access (before the statute was passed), whereas the government could—and can—force the private holder to grant access by "taking" the property right. Thus one might argue that § 1323 was just evening up the bilateral bargaining positions.

<sup>144</sup> See, e.g., *Montana Wilderness Ass'n*, 655 F.2d at 953.

access were not government officials (the government, in fact, sided with the private holders in the case), but instead were environmentalists committed to a vigorous statutory wilderness policy. In the last several years it has in fact been private citizens who have been denied access across private checkerboard lands, or have been forced to pay monopoly prices for such access.<sup>145</sup> Third, a more efficient rule in this situation would probably have been to grant rights of access to private holders *if* they were willing to grant reciprocal rights across their lands.

To be sure, the public choice analysis of section 1323(a) yields no clear analysis about the statute's overall worth, but the asymmetry of rights makes me suspicious. These suspicions are reinforced by the procedural background of the provision—added at the last minute, apparently at the behest of a well-organized group, without much of a public justification or any meaningful deliberation. Such statutes ought to be interpreted narrowly where possible. Nevertheless, although the court might have favored a narrow interpretation of section 1323(a), the Ninth Circuit felt constrained by the archeological evidence supporting a broader reading of the statute.<sup>146</sup> Yet a narrow interpretation would have done no damage, and would have sent a useful message to rent-seekers. The groups involved could very probably have kept the issue on the legislative agenda, though something as broad would not likely have survived much public scrutiny and debate. If the issue had been deliberated, it seems likely that a more balanced position would have emerged.<sup>147</sup>

Had the statute been drafted more clearly to create nationwide rights of access, the public choice perspective would have had little to add, for conventional rules of statutory interpretation—with the ambiguity gone—would have dictated only one result. As is often

---

<sup>145</sup> See Slocum, *Battle in the West: Public Lacks Access to Much Public Land as Ranchers Bar Way*, Wall St. J., Jan. 2, 1986, at 1, col. 1.

<sup>146</sup> Indeed, the court issued an earlier opinion construing § 1323 to apply only to Alaska lands. See *supra* note 130. It was the conference committee report to the act regarding Colorado wilderness lands, see *supra* p. 327, that impelled the court to withdraw the original opinion and issue the one that became final. See generally *Montana Wilderness Ass'n*, 655 F.2d at 957 (the conference report "tip[ped] the balance decidedly in favor of the broader interpretation of § 1323").

<sup>147</sup> For example, a statute could solve the problem of orderly land development most efficiently by assuring private holders of reasonable access if they were willing to grant the government similar rights.

the case, however, the court had substantial leeway for interpretation, and should have considered the public choice aspects of the question. Should the issue reach the Supreme Court, it ought to reach a different result.

### B. *The Milk Order Review Case*

In *Block v. Community Nutrition Institute*,<sup>148</sup> the Supreme Court narrowly interpreted the judicial review provisions of the Agricultural Marketing Agreement Act of 1937.<sup>149</sup> Enacted during the Depression (which many thought was caused or prolonged by low prices), the statute essentially permits milk producers to agree on minimum prices. To regulate this conduct, the Act authorizes the Secretary of Agriculture to issue "milk marketing orders" setting the minimum prices that handlers (who process dairy products) must pay to producers (dairy farmers).<sup>150</sup> The Secretary does this through one of several mechanisms, each of which calls for input from both producers and handlers, and the consent of at least one of the two groups.<sup>151</sup> The lawsuit in *Community Nutrition* was brought by consumers challenging the Secretary's refusal to revise orders issued in 1964 and regulating the sale of reconstituted (powdered) milk; the orders effectively discouraged the use of powdered milk as a competitive substitute, because they required compensatory payments by handlers to producers when handlers purchased powdered milk for sale to consumers.<sup>152</sup> The Supreme Court unanimously held that the Secretary's decision was not subject to judicial review at the behest of consumers.

---

<sup>148</sup> 467 U.S. 340 (1984).

<sup>149</sup> Ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-674 (1982 & Supp. IV 1986)).

<sup>150</sup> See 7 U.S.C. § 608c (1982 & Supp. IV 1986).

<sup>151</sup> The Secretary must conduct a rulemaking proceeding, with public hearing and comment, before issuing a milk market order. Id. § 608c(3). To be effective, an order not only has to be supported by evidence in the record, id. § 608c(4), but must be approved by the handlers of at least 50% of the volume of milk covered by the order and at least two-thirds of the affected producers in the region, id. § 608c(5), (8). If the handlers withhold their consent, the Secretary can still issue the order, upon an administrative finding that the "order is the only practical means of advancing the interests of the producers." Id. § 608c(9)(B).

<sup>152</sup> Complaint ¶¶ 23-39, *Community Nutrition Institute v. Bergland*, Civ. No. 80-3077 (D.D.C. Sept. 29, 1981), rev'd, 698 F.2d 1239 (D.C. Cir. 1983), rev'd, 467 U.S. 340 (1984); see *Community Nutrition*, 467 U.S. at 344.



The Court started with the rule that judicial review is presumptively available, unless the relevant statute precludes it.<sup>153</sup> The Court noted that the Act contemplates a "cooperative venture" among the Secretary, handlers, and producers; nowhere does the Act formally bring consumers into the marketing order proceedings, although the statute does set forth consumer welfare as a general purpose of the scheme.<sup>154</sup> Indeed, the Act explicitly allows handlers to seek judicial review of milk marketing orders.<sup>155</sup> Consumers are not afforded the same right. "In a complex scheme of this type," the Court reasoned, "the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process."<sup>156</sup> The Court further noted that creation of a new review mechanism would thwart the statutory scheme for handler review petitions, because handlers could also claim to be consumers.<sup>157</sup> In any event, said the Court, preclusion of consumer suits would not threaten the statute's objectives, because handlers have the same interest as consumers—"obtaining reliable supplies of milk at the cheapest possi-

---

<sup>153</sup> *Community Nutrition*, 467 U.S. at 348-49; see *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). This presumption of reviewability is not as robust as it once was; *Bachowski*, in 1975, probably marked its high-water point. Cf. *Heckler v. Chaney*, 470 U.S. 821 (1985) (FDA's decision not to take certain enforcement actions held not subject to judicial review); *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) (ICC decision not to investigate lawfulness of proposed increase in railroad shipping rates not subject to judicial review); *Morris v. Gressette*, 432 U.S. 491 (1977) (Attorney General's failure to object to a proposed change in voting rules under the Voting Rights Act of 1965 was not subject to judicial review).

<sup>154</sup> "It is declared to be the policy of Congress," says § 2 of the Act, "[t]o protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) . . . and (b) authorizing no action . . . which has for its purpose the maintenance of prices to farmers above [those established] in subsection 1 of this section." 7 U.S.C. § 602(2) (1982). The "policy of Congress" also directed that the Secretary use "the [commodity market ordering] powers conferred . . . under this chapter . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply [of the commodity—here, milk] . . . to avoid unreasonable fluctuations in supplies and prices." *Id.* § 602(4).

<sup>155</sup> 7 U.S.C. § 608c(15)(B).

<sup>156</sup> *Community Nutrition*, 467 U.S. at 347 (citing *Barlow v. Collins*, 397 U.S. 159, 168, 169 n.2, 175 & n.9 (1970) (opinion of Brennan, J.); *Switchmen v. National Mediation Bd.*, 320 U.S. 297, 300-01 (1943); and (most of all) *Morris v. Gressette*, 432 U.S. 491 (1977)). The Court noted that "when a statute contains a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons [is] implicitly precluded." *Id.* at 349.

<sup>157</sup> *Id.* at 348-52.

ble prices. . . . Handlers can therefore be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated."<sup>158</sup>

The Supreme Court's decision is logical and competently reasoned, but hardly the inevitable one, given the strong presumption of reviewability and the Act's repeatedly stated purpose "[t]o protect the interest of the consumer."<sup>159</sup> Moreover, the Court had once before expanded upon the "detailed mechanism" for review in the Act, to permit producers (who, like consumers, are *not* provided a right to seek review of the Secretary's orders) to seek review of deductions made by the Secretary from a "producer settlement fund" established in connection with marketing orders.<sup>160</sup> The Court's justification for reaching a different result in *Community Nutrition* was that handlers had no incentive to seek review of deductions from a producers' fund (hence a producers' suit was the only real remedy), but handlers do have an incentive to seek low milk prices (and thus serve as acceptable surrogates for consumers).<sup>161</sup>

This is an excellent example of how public choice theory would help the Court ask the right questions. The equation drawn by the Court between the handlers' and the consumers' interests was taken straight from the government's brief;<sup>162</sup> the consumers' brief did not significantly challenge this point. Yet in reality the equation is questionable. The reconstituted milk rule in *Community Nutrition* was in effect for almost two decades without being challenged by handlers—even though it very clearly created monopoly price abuses. One wonders why, and public choice theory offers a plausible answer. The marketing orders penalizing sales of cheap reconstituted milk are efforts to protect local monopoly prices charged by producers. If cheap "powdered milk" could be shipped from the cheaper-price Midwest to higher-price markets, it would force producers to cut their prices. Why don't handlers object to these monopoly prices? Economic theory suggests that they may

---

<sup>158</sup> Id. at 352 (citation omitted).

<sup>159</sup> See 7 U.S.C. § 602(2) (1982) (quoted *supra* note 154); id. § 602(4).

<sup>160</sup> See *Stark v. Wickard*, 321 U.S. 288, 308-10 (1944).

<sup>161</sup> *Community Nutrition*, 467 U.S. at 351-53.

<sup>162</sup> "[T]he interests of consumers are entirely derivative of the interests of handlers and can be protected in handler-initiated review proceedings." Brief for the Petitioners [Government] at 13, *Community Nutrition*; see id. at 29-30, 31.

be bought off by producers, who cede them a share of their monopoly profits.<sup>163</sup> The consumers foot the bill, yet *Community Nutrition* holds that they are the only ones who cannot sue for review of the Secretary's orders!

The result in *Community Nutrition* should have been to permit judicial review at the behest of consumers. The functional purpose of such review would be to open up a statutory scheme that has become petrified and increasingly rent-seeking over time. Perhaps in the 1930's the statutory scheme of milk price minima served a useful purpose (to save the dairy industry and assure a steady supply of milk), but over time the statutory scheme has become rent-seeking, costing the country an estimated \$60 to \$100 million per year.<sup>164</sup> This is the natural evolution of a regulatory scheme with asymmetrical costs and benefits: the concentrated beneficiaries (dairy farmers) have built alliances with the regulators in the Department of Agriculture (itself a notoriously captured agency anyway) and have bought off the main concentrated group of cost payers (the handlers). This is the classic "capture" scenario. In such a situation, the Court should seek to open up the regulatory process wherever possible. Affording judicial review to the diffuse cost payers (milk consumers) would be a useful procedural reform by which to check—and perhaps reverse—the rent-seeking.

Judge Easterbrook has endorsed the result in *Community Nutrition*, even though he is critical of the rent-seeking arrangement it perpetuates. "Perhaps the devil's bargain was that the producers agreed to accept the mild supervision by the Secretary rather than effective supervision by the courts in exchange for permitting some additional competition in the run of things."<sup>165</sup> I doubt that anyone, fifty years after enactment, could identify the precise "bargain" found in the statute. In any event, why should we care? The public justification for the judicial review procedures in the Act was to "establish an equitable and expeditious procedure for testing the validity of [milk marketing] orders."<sup>166</sup> The assumption of that justification has always been, as *Community Nutrition* explic-

---

<sup>163</sup> See Easterbrook, Foreword, *supra* note 6, at 49-51.

<sup>164</sup> *Id.* at 49 n.114.

<sup>165</sup> *Id.* at 50.

<sup>166</sup> S. Rep. No. 1011, 74th Cong., 1st Sess. 14 (1935), *quoted in* Brief for the Petitioners [Government] at 20, *Community Nutrition*.

itly stated, that handlers would be effective surrogates for the public. They are, however, no longer (and perhaps never were) effective surrogates, because their interests tend to coincide with those of producers. The interest groups supporting the Act and its regulatory apparatus should be held to their agreement to afford an "equitable" procedure for challenging the orders. Allowing consumer suits would therefore be the best way to open up the interest group closure perpetuated over the last fifty years. Moreover, it would also be the best way to effectuate the balanced system that Congress originally envisioned.

### C. The Affirmative Action Case

Consider, finally, the Supreme Court's decision in *Johnson v. Transportation Agency, Santa Clara County, California*,<sup>167</sup> described above. The decision interpreted section 703(a) of the Civil Rights Act of 1964, which prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>168</sup> The issue was whether section 703(a) protects white males who are deprived of employment opportunities because of voluntary affirmative action plans that favor female applicants. The Court had earlier approved of plans favoring black applicants in *United Steelworkers v. Weber*.<sup>169</sup> The Court in *Johnson* not only reaffirmed and followed *Weber*, but expanded it to justify affirmative action plans whenever there are manifest racial or sexual imbalances within traditionally segregated job categories.<sup>170</sup> Justice O'Connor concurred in the judgment, but not in the expansion of *Weber*.<sup>171</sup> Three Justices dissented; the main dissenting opinion was written by Justice Scalia.

The Court's expansion of *Weber* seems questionable in light of its public choice consequences, as Justice Scalia argued in some detail.<sup>172</sup> On its face, section 703(a) itself is a distributed benefit,

---

<sup>167</sup> 107 S. Ct. 1442 (1987); see supra pp. 302-03.

<sup>168</sup> 42 U.S.C. § 2000e-2(a) (1982).

<sup>169</sup> 443 U.S. 193 (1979).

<sup>170</sup> 107 S. Ct. at 1452-53.

<sup>171</sup> Id. at 1461-62 (O'Connor, J., concurring in the judgment).

<sup>172</sup> Id. at 1471-76 (Scalia, J., dissenting). In other articles, I have examined *Weber* and *Johnson* in greater detail than I do here. See Eskridge, supra note 10, at 1488-96; Eskridge, Overruling Statutory Precedents, 76 Geo. L.J. (forthcoming April 1988).

distributed cost law, for it protects all who work for a covered entity against racial and sexual discrimination, and it applies to most employers, unions, and joint labor-management committees in the country. It can also, however, be analyzed as a concentrated cost law, because the target group of unions and companies, though numerous, is (like farmers) relatively well-defined and cohesive. One problem with these laws is that they are subject to a process of erosion as exceptions are carved out of them; section 703 itself creates a number of loopholes to appease labor unions<sup>173</sup> and management.<sup>174</sup> Most troubling is the tendency of cost bearers to displace some or all of the costs onto others, and to some extent this has occurred under title VII.<sup>175</sup>

Employers and unions fearing title VII liability because of their own past discrimination, or even because of hard-to-explain continuing imbalances in their workforces, can effectively avoid liability (and potential backpay awards against them) by voluntarily adopting affirmative action plans. These plans shift much of the costs onto white male employees. "This situation is more likely to obtain," Justice Scalia reminded the Court, "with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past."<sup>176</sup> This group, though numerous, is diffuse and politically unorganized. By expanding upon a statutory exception that hurts that group, the Court is being unfair in ways that Congress will not likely correct, because the best-organized groups—civil rights organizations, unions, employers—are by and large happy with the decision.<sup>177</sup> In short, the public choice perspective eloquently articu-

---

<sup>173</sup> E.g., Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1982) (exception for bona fide seniority arrangements); see *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 577 (1984) (seniority arrangement to be upheld by a court, absent a showing of discriminatory intent behind the arrangement).

<sup>174</sup> E.g., Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1982) (defense for bona fide occupational qualifications).

<sup>175</sup> Section 703(a) can also be analyzed as a concentrated benefit statute. Although all employees are technically protected against race and sex discrimination, the effective protection is for concentrated groups—blacks and women. Both groups are more likely to organize politically (as indeed they have) and, consequently, might be prone to extract special benefits for themselves over time.

<sup>176</sup> *Johnson*, 107 S. Ct. at 1475 (Scalia, J., dissenting).

<sup>177</sup> The *Johnson* Court hardly responded to Justice Scalia's public choice concern. Compare *id.* at 1450 n.7 (Congress' failure to react can, to some extent, be taken as an implicit

lated by Justice Scalia suggests that the Court's expansive approach to affirmative action might be politically unfair.

Should *Weber* be overruled? Not necessarily, because the public choice consequences are counterbalanced not only by the stability-of-law and reliance concerns of *stare decisis*, but also by concerns regarding the evolution of statutory policy. Section 703(a)'s prohibition of "discrimination" (a term not defined in the Act) has essentially been developed in a common law fashion by the Court, and that evolution has taken the statute far beyond the limits originally imagined by Congress. The assumption in 1964 was that once color- and sex-blind hiring decisions were legally mandated, blacks, women, and other minorities would assume their rightful places in the workforce. But unanticipated problems, such as the continuing effects of past discrimination and stereotypes, have undercut that original assumption. The Court has responded in a pragmatic, common law fashion by interpreting section 703(a) to get at employment practices that effectively exclude certain groups and, whenever possible, to encourage voluntary redress of problems by employers and unions themselves.<sup>178</sup> Indeed, in both *Weber* and *Johnson*, the facts indicated that blacks and women might well have continued to be excluded had there not been an affirmative action plan in place. At least for now, voluntary affirmative action plans are probably necessary to make the statutory scheme "work." Hence, Justice Scalia's public choice arguments, though valid, are just one perspective that one must bring to bear when interpreting the statute.

Given these competing concerns, how should section 703(a) have been (or be) interpreted? Justice O'Connor's concurring opinion is the only opinion that openly considered both concerns. She suggested that the statute permits voluntary affirmative action "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination."<sup>179</sup> Her opinion was

---

approval of the Court's decision) with *id.* at 1472-73 (Scalia, J., dissenting) (simple inertia may well explain Congress' inaction).

<sup>178</sup> See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Congress favored voluntary compliance); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment test in effect barred most black applicants).

<sup>179</sup> *Johnson*, 107 S. Ct. at 1461 (O'Connor, J., concurring in the judgment). According to Justice O'Connor, "the employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical

a sensitive attempt to take something from each perspective, and hence to approve a limited use of affirmative action. The best lesson of public choice theory here is that the temporary nature of such voluntary plans is critical: the statutory scheme requires some affirmative action, but the Court should be mindful that such efforts should not give employers and unions a permanent and unrestricted *carte blanche* to shift costs to the lower-level, nonfavored employees typically hurt by these efforts at affirmative action.

### CONCLUSION

In this decade, the unfortunately neglected field of statutory interpretation has enjoyed something of an intellectual renaissance. Exploration of the field has been enriched by insights from other disciplines, particularly by models of the political process. There is, at this point, no uncontroversial model of the political process, though it is all but settled that the optimistic political assumptions of the 1950's were wrong. Still, each of the leading political process models has something constructive to offer legal theory of statutory interpretation. After two decades of empirical and theoretical development, public choice theory may have the most to offer, despite its limitations. Its implications for statutory interpretation will likely occupy scholars for the next decade.

Where will this inquiry lead? As I have suggested in this Article, I do not think public choice theory will rigorously support any of the traditional foundationalist approaches to statutory interpretation (based on original intent, text, and original purpose). Rather than teaching us that statutory interpretation is a puzzle that can be determinatively resolved, public choice theory will teach us that statutory interpretation is more complicated than we once thought it, for the inquiries suggested by public choice theory are complicating rather than simplifying. For instance, *do* courts in fact have comparative institutional advantages that permit them to transform or update statutes through interpretation? If so, which stat-

---

disparity sufficient to support a *prima facie* claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination." Id.

utes should be transformed, and which left alone? Can courts develop strategies that encourage Congress and agencies to reduce the incidence of rent-seeking in public law?

The most exciting element of the public choice influence on statutory interpretation will be its emphasis on the *dynamics* of statutory law—a concept that courts must recognize in this age of statutes. As statutory law has become profoundly complex and important, we can no longer afford to interpret statutes as static, unrelated incidents. A statute must be interpreted with an eye to what it is *becoming*, not what it was originally. As an important insight on the evolution of statutes, and especially on the dysfunctions in that evolution, public choice theory will become an increasingly useful tool of statutory analysis.